for the passage of a bill to forbid liquor selling in canteens and in the Army, Navy, and Soldiers' Homes—to the Committee on Military Affairs.

By Mr. SMITH of Kentucky: Paper to accompany House bill granting a pension to Thomas Kincaid—to the Committee on Invalid Pensions.

Also, paper to accompany House bill granting a pension to S. F. Kissinger—to the Committee on Invalid Pensions.

Also (by request), petition of M. P. Hodges Post, No. 60, Department of Kentucky, Grand Army of the Republic, in favor of the establishment of a Branch Soldiers' Home near Johnson City, Tenn.—to the Committee on Military Affairs.

By Mr. SPERRY: Petitions of the Woman's Christian Temperance Union of East Haddam, Conn., for the passage of a bill to forbid the sale of liquors in canteens—to the Committee on Military Affairs.

By Mr. STEWART of New Jersey: Petition of Dwight Post, No. 103, of Englewood, N. J., Grand Army of the Republic, in favor of House bill No. 7094, to establish a Branch Soldiers' Home at Johnson City, Tenn.—to the Committee on Military Affairs.

By Mr. SULZER: Petition of the Trades League of Philadelphia, Pa., urging the passage of a bill providing for the early construction of the Nicaragua Canal—to the Committee on Interstate and Foreign Commerce.

Also, petition of the National Association of Railway Postal Clerks, relating to the reclassification of the Railway Mail Service—to the Committee on the Post-Office and Post-Roads.

By Mr. WADSWORTH: Petitions of Staunton Post, No. 396, and Tilton's Post, No. 660, Department of New York, Grand Army of the Republic, in favor of the establishment of a Branch Soldiers' Home near Johnson City, Tenn.—to the Committee on Military Affairs.

By Mr. WILSON of Idaho: Five petitions of George Green and others, of Magnolia; J. P. Triplett and others, of Beeman, and citizens of Cameron, Lenore, and Lewiston and Nez Perce County, Idaho, for the passage of a free-homestead bill—to the Committee on the Public Lands.

SENATE.

TUESDAY, *April 24, 1900.*

The Senate met at 11 o'clock a. m.

Prayer by the Chaplain, Rev. W. H. MILBURN, D. D.

The Secretary proceeded to read the Journal of yesterday's proceedings, when, on request of Mr. DAVIS, and by unanimous consent, the further reading was dispensed with.

The PRESIDENT pro tempore. The Journal will stand approved, without objection.

JORGE CRUZ.

The PRESIDENT pro tempore laid before the Senate a communication from the Attorney-General, transmitting, in response to a resolution of the 21st instant, certain information relative to what action has been taken by the Attorney-General in the case of Jorge Cruz, a resident of Porto Rico, alleged to have been brought into this country under a contract to labor in the United States; which was referred to the Committee on Pacific Islands and Porto Rico, and ordered to be printed.

COMMISSIONED NAVAL OFFICERS.

The PRESIDENT pro tempore laid before the Senate a communication from the Secretary of the Navy, transmitting, in response to a resolution of the 18th instant, a statement prepared by the Bureau of Navigation, Navy Department, giving the total number of commissioned naval officers on the 31st day of December, 1899, the number on shore duty, etc.; which, with the accompanying paper, was referred to the Committee on Naval Affairs, and ordered to be printed.

STATISTICS RELATIVE TO NAVY-YARDS.

The PRESIDENT pro tempore laid before the Senate a communication from the Secretary of the Navy, transmitting, in response to a resolution of the 2d instant, a tabulated statement showing the number of commissioned officers on duty at each navy-yard and naval station in the United States during the month of March, etc.; which, with the accompanying papers, was referred to the Committee on Naval Affairs, and ordered to be printed.

WAR-REVENUE RECEIPTS.

The PRESIDENT pro tempore. The Chair lays before the Senate a communication from the Secretary of the Treasury, transmitting, in response to a resolution of the 20th instant, a letter from the Commissioner of Internal Revenue showing the amount of revenue derived from the so-called war-revenue law, so far as it is practicable to do so.

Mr. COCKRELL. As the Senator from New Hampshire [Mr. GALLINGER], at whose request the resolution was passed, is not present, I move that the communication and accompanying papers lie on the table and that they be printed.

The motion was agreed to.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. W. J. BROWNING, its Chief Clerk, announced that the House had passed the following bills; in which it requested the concurrence of the Senate:

A bill (H. R. 4468) to authorize the city of Tucson, Ariz., to issue bonds for waterworks, and for other purposes;

A bill (H. R. 5296) establishing terms of the United States circuit court at Newbern and Elizabeth City, N. C.;

A bill (H. R. 7945) to amend an act entitled "An act permitting the building of a dam across Rainy Lake River;"

A bill (H. R. 6868) to amend an act authorizing the terms of the district court of the United States for the southern district of Mississippi to be held hereafter at Biloxi;

A bill (H. R. 8962) to authorize the New Orleans and Northwestern Railway Company, its successors and assigns, to build and maintain a bridge across Bayou Bartholomew in the State of Louisiana; and

A bill (H. R. 9496) to provide for the disposal of the Fort Buford abandoned military reservation, in the States of North Dakota and Montana.

ENROLLED BILLS SIGNED.

The message also announced that the Speaker of the House had signed the following enrolled bills; and they were thereupon signed by the President pro tempore:

A bill (S. 3465) to provide an American register for the steamship *Garonne;*

A bill (S. 3924) to authorize the construction of a bridge across Tallahatchie River, in Tallahatchie County, Miss.;

A bill (S. 4051) to authorize the Ohio Valley Electric Railway Company to construct a bridge over the Big Sandy River from Kenova, W. Va., to Catlettsburg, Ky.; and

A bill (H. R. 4604) to amend the charter of the East Washington Heights Traction Railway Company.

PETITIONS AND MEMORIALS.

Mr. CULLOM presented a memorial of sundry citizens of Aurora, Ill., remonstrating against the passage of the so-called parcels-post bill; which was referred to the Committee on Post-Offices and Post-Roads.

He also presented a petition of Local Union No. 174, Cigar Makers' International Union, of Joliet, Ill., praying for the enactment of legislation to protect free labor from prison competition, and also to limit the hours of daily service of laborers and mechanics employed upon the public works of the United States; which was referred to the Committee on Education and Labor.

He also presented a petition of the Illinois Lumber Dealers' Association, praying for the adoption of certain amendments to the interstate-commerce law; which was referred to the Committee on Interstate Commerce.

He also presented a memorial of the Union Veterans' Union, of Washington, D. C., remonstrating against the enactment of legislation relative to the promotion of the Adjutant-General of the Army to the rank of major-general; which was referred to the Committee on Military Affairs.

He also presented a petition of Hall of Smedell Post, No. 257, Grand Army of the Republic, of Greenup, Ill., praying for the enactment of legislation granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor; which was referred to the Committee on Pensions.

He also presented a petition of the Trades and Labor Assembly of Belleville, Ill., praying for the enactment of legislation to increase the pay of all male employees in the Government Printing Office; which was referred to the Committee on Printing.

He also presented petitions of the Young People's Society of Christian Endeavor of Rardin, the Woman's Christian Temperance Union of Freeport, and of the congregation of the Presbyterian Church of Harrisburg, all in the State of Illinois, praying for the enactment of legislation to prohibit the sale of intoxicating liquors in Army canteens and our new island possessions; which were referred to the Committee on Military Affairs.

He also presented memorials of Local Union No. 703, United Mine Workers, of O'Fallon; of Local Union No. 972, United Mine Workers, of Streator; of Local Union No. 728, United Mine Workers, of Mount Olive; of Local Union No. 41, Cigar Makers' International Union, of Aurora; of the Central Labor Union of Rockford; of Local Union No. 732, United Mine Workers, of Pottstown, and of Local Union No. 503, United Mine Workers, of Westville, all in the State of Illinois, remonstrating against the enactment of legislation imposing a tax upon butterine, oleomargarine, and all other kindred dairy products; which were referred to the Committee on Agriculture and Forestry.

Mr. PENROSE presented petitions of the congregation of the Presbyterian Church of Kittanning; of James O'Donald Post,

Grand Army of the Republic, of Kellersburg; of the congregation of the Methodist Episcopal Church of Kittanning; of sundry religious societies of East Smithfield; of the Woman's Christian Temperance Union of Cochranville; of the Woman's Christian Temperance Union of Berrytown; of the congregations of the United Evangelical Church of Myerstown; the Methodist Episcopal Church of Jamestown; the First Presbyterian Church of Apollo; of Gustin Post, Grand Army of the Republic, of Troy; of the congregation of the United Presbyterian Church of Apollo; of the Woman's Christian Temperance Union of Bristol; of 31 citizens of Delaware County; of C. S. Whitworth Post, No. 89, of Apollo; of the congregation of the Lutheran Church of Apollo; of the congregation of the Methodist Episcopal Church of Sheakleyville; of the Woman's Christian Temperance Union of Parkerford; of the congregation of the First Baptist Church of Kittanning; of the Baptist Christian Endeavor Society of Montrose; of the Presbyterian Christian Endeavor Society of Montrose; of the Young Men's Christian Association of Montrose; of the Epworth League of Montrose; of the Union of Churches of Big Run; of the Unity Place Congregation, of Charleston; of the Woman's Christian Temperance Union of New London; of the congregation of the United Brethren Church of Union; of the Woman's Christian Temperance Union of Grand Valley; of the Radnor Methodist Episcopal Church of Bryn Mawr; of the Woman's Christian Temperance Union of Waterford; of the Woman's Christian Temperance Union of Ridgway; of the congregations of the Free Methodist Church of Ridgway; of the Methodist Episcopal Church of Ridgway; of the Methodist Episcopal Church of Parkers Landing; of the Presbyterian Church of Parker; of the Christian Endeavor Society of Parker; of the Epworth League of Parkers Landing, and of the Woman's Christian Temperance Union of Gravity, all in the State of Pennsylvania, praying for the enactment of legislation to prohibit the sale of intoxicating liquors in any post exchange, canteen, or transport, or upon any premises used for military purposes by the United States; which were referred to the Committee on Military Affairs.

Mr. BURROWS presented a memorial of the Jackson City Soap Company, of Jackson, Mich., remonstrating against the enactment of legislation to prohibit the use of alum in the manufacture of baking powder; which was referred to the Committee on Agriculture and Forestry.

He also presented a petition of J. B. Sackett Post, No. 320, Grand Army of the Republic, Department of Michigan, of Prairieville, Mich., praying for the enactment of legislation granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor; which was referred to the Committee on Pensions.

He also presented petitions of the Niles District Ministerial Association, of the congregation of the Methodist Episcopal Church, of the Woman's Christian Temperance Union, of the Epworth League, and of the Public Worship, all of Union City, in the State Michigan, praying for the enactment of legislation to prohibit the sale of intoxicating liquors in Army canteens, etc.; which were referred to the Committee on Military Affairs.

He also presented a petition of the congregation of the Presbyterian Church of Evart, Mich., praying for the enactment of legislation to prohibit the sale of intoxicating liquors in Alaska, Philippine Islands, Porto Rico, and Cuba, and also for the reenactment of the nullified anti-canteen law; which was ordered to lie on the table.

He also presented a petition of the Trades League of Philadelphia, Pa., praying for the enactment of legislation to diminish the deficit in the Postal Department by the adoption of 1-cent letter postage; which was referred to the Committee on Post-Offices and Post-Roads.

Mr. FRYE presented a petition of the Wage Earners' League of Municipal Progress of New York, praying for the enactment of legislation to promote the commerce and increase the foreign trade of the United States; which was ordered to lie on the table.

BILLS INTRODUCED.

Mr. FORAKER introduced a bill (S. 4322) for the relief of the legal representatives of William H. Hays, deceased; which was read twice by its title, and referred to the Committee on Claims.

He also introduced a bill (S. 4323) for the relief of acting assistant surgeons, United States Army; which was read twice by its title, and referred to the Committee on Military Affairs.

Mr. LODGE introduced a joint resolution (S. R. 118) to set apart the 12th day of February in each year upon which to celebrate the birthday of Abraham Lincoln; which was read twice by its title, and referred to the Committee on the Judiciary.

AMENDMENTS TO APPROPRIATION BILLS.

Mr. LODGE submitted an amendment proposing to increase the salary of one clerk to department, navy-yard, Boston, Mass., from $1,300 to $1,400, intended to be proposed by him to the naval appropriation bill; which was referred to the Committee on Naval Affairs, and ordered to be printed.

Mr. FORAKER submitted an amendment providing that all honorably discharged officers, acting assistant surgeons, and enlisted men of the Volunteer Army of the United States shall be entitled to the benefits of the National Home for Disabled Volunteer Soldiers, intended to be proposed by him to the Army appropriation bill; which was ordered to lie on the table and be printed.

ELENDER HERRING.

Mr. BAKER. I offer a concurrent resolution requesting the President to return Senate bill 1265, granting a pension to Elender Herring, and I ask unanimous consent for its immediate consideration.

The PRESIDENT pro tempore. The concurrent resolution will be read.

The concurrent resolution was read, considered by unanimous consent, and agreed to, as follows:

Resolved by the Senate (the House of Representatives concurring), That the President be requested to return to the Senate the bill of the Senate No. 1265, "granting a pension to Elender Herring."

HOUSE BILLS REFERRED.

The following bills were severally read twice by their titles, and referred to the Committee on the Judiciary;

A bill (H. R. 5296) establishing terms of the United States circuit court at Newbern and Elizabeth City, N. C.; and

A bill (H. R. 6868) to amend an act authorizing the terms of the district court of the United States for the southern district of Mississippi to be held hereafter at Biloxi.

The following bills were severally read twice by their titles, and referred to the Committee on Commerce:

A bill (H. R. 7945) to amend an act entitled "An act permitting the building of a dam across Rainy Lake River;" and

A bill (H. R. 8962) to authorize the New Orleans and Northwestern Railway Company, its successors and assigns, to build and maintain a bridge across Bayou Bartholomew, in the State of Louisiana.

The bill (H. R. 4468) to authorize the city of Tucson, Ariz., to issue bonds for waterworks, and for other purposes, was read twice by its title, and referred to the Committee on Territories.

The bill (H. R. 9496) to provide for the disposal of the Fort Buford abandoned military reservation, in the States of North Dakota and Montana, was read twice by its title, and referred to the Committee on Public Lands.

RESERVOIR SITES IN WYOMING AND COLORADO.

The PRESIDENT pro tempore laid before the Senate the amendment of the House of Representatives to the joint resolution (S. R. 10) providing for the printing of 3,000 copies of House Document No. 141, relating to the preliminary examination of reservoir sites in Wyoming and Colorado.

The amendment of the House of Representatives was to strike out all after line 7 down to and including line 10 and to insert:

Thousand copies for the use of the Senate, and 2,000 copies for the use of the House of Representatives.

Mr. PLATT of New York. I am authorized by the Committee on Printing to move that the Senate concur in the amendment of the House of Representatives.

The motion was agreed to.

COMMISSIONS APPOINTED BY THE EXECUTIVE.

The PRESIDENT pro tempore. The Chair lays before the Senate a resolution offered by the Senator from Texas [Mr. CULBERSON], coming over from a previous day. It has been read.

Mr. DAVIS. It has been read. I suggest an amendment to the resolution, in line 5, to strike out "1897" and insert "1885."

Mr. CULBERSON. I have no objection to the amendment.

The PRESIDENT pro tempore. The amendment will be agreed to, without objection.

Mr. CULBERSON. I desire to offer another amendment.

Mr. HALE. What is the resolution?

The PRESIDENT pro tempore. The resolution calling for information about commissions appointed by the President.

Mr. CHANDLER. And it has been amended to go back to 1885.

Mr. HALE. It is a resolution coming over from yesterday morning?

The PRESIDENT pro tempore. It is.

Mr. CULBERSON. I desire to amend the resolution by inserting, after the word "compensation," in line 9, the words "or allowance."

The PRESIDENT pro tempore. The Senator has a right to make the modification. The question is on agreeing to the resolution as modified.

The resolution as modified was agreed to, as follows:

Resolved, That the President be requested, if not incompatible with the public interests, to inform the Senate, first, what commissions have been created or appointed by the Executive or under his authority since March 4, 1885, in reference to the foreign relations of the Territories of the United States or to inquire into the conduct of the late war with Spain; second, the names of the persons composing each of said commissions; third, the total compensation or allowance paid each of said commissioners; fourth, the total compensation paid each of the secretaries, clerks, and other employees of each of said commissions, and fifth, the total traveling, incidental, and other expenses of each of said commissions.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. W. J. BROWNING, its Chief Clerk, announced that the House had passed, with an amendment, the joint resolution (S. R. 116) to provide for the administration of civil affairs in Porto Rico pending the appointment and qualification of the civil officers provided for in the act approved April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes;" in which it requested the concurrence of the Senate.

SENATOR FROM PENNSYLVANIA.

The PRESIDENT pro tempore. The Chair lays before the Senate the resolution which will be read.

The Secretary read the resolution reported by Mr. TURLEY from the Committee on Privileges and Elections January 23, 1900, as follows:

Resolved, That the Hon. Matthew S. Quay is not entitled to take his seat in this body as a Senator from the State of Pennsylvania.

Mr. PENROSE. I yield to the Senator from Minnesota [Mr. NELSON] for a moment.

REGULATIONS FOR LOGS AND RAFTS.

Mr. NELSON. I ask unanimous consent for the present consideration of the bill (H. R. 9824) authorizing the Secretary of War to make regulations governing the running of loose logs, steamboats, and rafts on certain rivers and streams.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill, which had been reported from the Committee on Commerce with an amendment, to strike out all after the enacting clause and insert:

That the Secretary of War shall have power, and is hereby authorized and directed, to prescribe rules and regulations to govern the floating of loose timber and logs, and sack rafts, so called, of timber and logs and general navigation, on any one or all of the navigable rivers or waterways of the United States, wherever in his judgment such regulations are necessary to equitably adjust and govern the conflicting interests of logging and other forms of navigation; and such regulations, when so prescribed and published, shall have the force of law, and any violation thereof shall be a misdemeanor, and every person convicted of a violation thereof shall be punished by a fine of not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in the case of crimes against the United States.

SEC. 2. That the Secretary of War may, at any time, alter or modify any rules and regulations prescribed by him under the provisions of this act; and he may rescind such rules and regulations whenever in his judgment the necessity for their continuance no longer exists.

SEC. 3. That whenever rules and regulations shall have been prescribed by the Secretary of War for any waterway, in pursuance of section 1 of this act, and until such rules and regulations shall have been rescinded by his order, the said waterway shall be exempt from the prohibition contained in section 15 of the river and harbor act approved March 3, 1899, against floating loose timber and logs, or what is known as sack rafts of timber and logs, in streams or channels actually navigated by steamboats.

SEC. 4. That the right to alter, amend, or repeal this act at any time is hereby reserved.

SEC. 5. That this act shall not, nor shall any rules or regulations prescribed thereunder, in any manner affect any civil action or actions heretofore commenced and now pending to recover damages claimed to have been sustained by reason of the violation of any of the terms of said section 15 of the act of March 3, 1899, as originally enacted, or in violation of any other law.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

The title was amended so as to read: "A bill authorizing the Secretary of War to make regulations governing the running of loose logs and rafts on navigable waters."

GOVERNMENT FOR PORTO RICO.

The PRESIDENT pro tempore laid before the Senate the amendment of the House of Representatives to the joint resolution (S. R. 116) to provide for the administration of civil affairs in Porto Rico pending the appointment and qualification of civil officers provided for in the act approved April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes."

The amendment of the House of Representatives was, after line 13, to insert the following additional sections:

SEC. 2. That all franchises, privileges, or concessions mentioned in section 32 of said act shall be approved by the President of the United States, and no such franchise, privilege, or concession shall be operative until it shall have been so approved.

SEC. 3. That all charters granting any franchises, privileges, or concessions mentioned in section 32 of said act to private corporations shall provide that the same shall be subject to amendment, alteration, or repeal; shall forbid the issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation, equal in amount to the par value of the stock or bonds issued; shall forbid the declaring of stock or bond dividends; and, in the case of public-service corporations, shall provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair valuation. No corporation shall be authorized to conduct the business of buying and selling real estate, of issuing currency, or of engaging in agriculture, or permitted to hold or own real estate, except such as may be reasonably necessary to enable it to carry out the purposes for which it was created. Banking corporations, however, may be authorized to loan funds upon real-estate security, and to purchase real estate when necessary for the collection of loans, but they shall dispose of real estate so obtained within five years after receiving the title. Corporations other than those organized in Porto Rico, and doing business therein, shall be bound by the provisions of this section so far as they are applicable.

Mr. FORAKER. I move that the Senate nonconcur in the amendment of the House of Representatives to the joint resolution, and request a conference on the disagreeing votes of the two Houses.

The motion was agreed to.

By unanimous consent, the President pro tempore was authorized to appoint the conferees on the part of the Senate; and Mr. FORAKER, Mr. PERKINS, and Mr. COCKRELL were appointed.

SENATOR FROM PENNSYLVANIA.

The Senate resumed the consideration of the following resolution, reported by Mr. TURLEY from the Committee on Privileges and Elections January 23, 1900:

Resolved, That the Hon. Matthew S. Quay is not entitled to his seat in this body as a Senator from the State of Pennsylvania.

Mr. PENROSE resumed and concluded the speech begun by him yesterday. The entire speech is as follows:

Mr. PENROSE. Mr. President, I do not desire to trespass upon the time of the Senate in my discussion of the validity of the executive appointment of Matthew S. Quay as a United States Senator from Pennsylvania any longer than can be avoided. I feel that the able arguments which have been made upon both sides of this question by Senators who have served for years upon the Committee on Privileges and Elections, and who are familiar with the debates and discussions upon the subject to a far greater degree than I can possibly be, place me at a disadvantage. At the same time I believe that I owe a duty to the great constituency which I represent in this Senate to express my views upon this question of constitutional interpretation, and to call the attention of the Senate to certain facts pertaining to the case. As there is a disposition on the part of those who dispute the validity of various executive appointments of Senators to indulge in refinement of differences and distinctions among the various cases they may see fit to approve or disapprove, it will be useful to recall to the attention of the Senate the facts in the present case.

The full term of the Hon. Matthew Stanley Quay, senior United States Senator from Pennsylvania, expired on the 3d day of March, 1899, while the legislature was still in session. By the provisions of article 2, section 4, of the constitution of Pennsylvania the general assembly shall meet at 12 o'clock on the first Tuesday of January every second year, and accordingly the legislature met upon the first Tuesday of January, 1899. At the beginning of the session, in order to expedite the legislative business and to economize in the expenditure of public funds, a concurrent resolution was offered in the senate fixing the time for final adjournment on the 20th day of April following. This resolution unanimously passed both houses. It then became a standing rule of the legislature, and, under our parliamentary practice, could not be changed except by a two-thirds vote. Pursuant to a published call, signed by the chairman of the Republican caucuses of the senate and the house of representatives, respectively, the same having been issued at the customary time and place and by the officials and in the manner prescribed by the party regulations, a joint caucus of the Republican members of the senate and house of representatives was held January 3, 1899, for the purpose of nominating a person to be voted for as the Republican candidate for the office of United States Senator.

At this caucus several candidates were voted for, but Senator Quay, having received 98 out of the 109 Republican votes present, was unanimously declared the caucus nominee of the Republican party. Under the act of assembly of January 11, 1867, reaffirming the similar act of Congress of July 25, 1866, regulating the election of United States Senators, the legislature proceeded to ballot on the third Tuesday of January, 1899. Upon the following day the members of the two houses convened in joint assembly, and it appearing upon the reading of the journal of each house that the same person had not received a majority of the votes in each house, as required by the act of assembly aforesaid, the joint assembly then proceeded to chose a person for the office of United States Senator, and continued to ballot each succeeding day until the legislature adjourned on the 20th day of April, as required by the resolution aforesaid. Inasmuch as none of the candidates received a majority of the votes cast, no election resulted. On the first ballot taken in the joint assembly, Quay, Republican, received 112 votes; Jenks, Democrat, 82; leaving scattering and absent, 60.

On account of members and senators absent and not sworn in, it required 126 votes to make the majority necessary to elect. In this manner the balloting proceeded day after day until the close of the session, Quay receiving the support of the regular Republicans, Jenks, of all the Democrats, and the other senators and members dividing their strength among the various candidates. Seventy-nine ballots had been taken when the legislature adjourned without day on the date above mentioned. On the 21st day of

April, 1899, the legislature having adjourned and a vacancy in the office of United States Senator existing by reason of the failure of the legislature to elect, the governor, believing that the State was entitled to a full representation in the Senate under the provisions of section 2 of Article II of the Federal Constitution, appointed Mr. Quay to fill the vacancy until the next meeting of the legislature.

The question at issue is purely one of constitutional interpretation, "Is this a legal appointment?" or, in other words, the question is, "Can a vacancy which is caused by the expiration of a Senatorial term, and which takes place during the session of the legislature, be filled by executive appointment?" The determination of the question depends entirely upon the construction of the brief and concise provisions in the Constitution regarding the appointment of United States Senators. The question has been exhaustively discussed upon similar occasions in this Senate. It has often been affected by partisanship and by the peculiar exigencies of particular cases. In the mass of technical and subtle refinements and distinctions to which the simple words of the Constitution have been subjected, the meaning of these words to a certain extent seems to have become involved in obscurity and doubt. It is becoming apparent, however, that the progressive, common-sense interpretation of this question has become more and more predominant in sustaining the validity of executive appointments to fill Senatorial vacancies whenever a vacancy may occur.

The provisions of the Constitution relating to the Senate of the United States read as follows:

Article I, section 3:

(1) The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

(2) Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Let us read carefully each succeeding word in the two clauses of the Constitution quoted above, without prejudice, and without predetermined theory, in a spirit of fairness and of common sense, and a recognition of the paramount purpose of their provisions, and I feel confident that we can come to but one conclusion. That conclusion is that the purpose of the Constitution of the United States was to create a Senate, and in the constitution of that Senate is involved the principle that the Senate should be kept filled, and that each individual Senatorial office should be filled, in order that the integrity of the body might be preserved; and to effect this admitted purpose two methods of filling Senatorships were provided for by the Constitution. The first method is by an election by the legislature, which election fills either the whole Senatorial term or the full remainder of any Senatorial term. Secondly, in case of vacancies, for whatever cause, the fact of the vacancy being alone required, existing when the legislature is not in session, the governor may fill such vacancies by temporary appointment. Thus there are two classes of Senatorial appointments, one for the full term by the election of the legislature, and the other, temporary in its character, until the legislature meets and acts. Both are separate and distinct in their spheres, conflict in no wise, and together form a complete system for keeping the Senate filled. I believe also as we proceed to consider the words in the Constitution and recall the history of their interpretation, we shall be struck with this fact, that in numerous instances these words have been interpreted and even strained in their interpretation in order to carry out this admitted purpose of the Constitution, to avoid chasms in the representation of the Senate and to keep it filled.

No more important and impressive lesson could be learned than to consider the several cases to which I shall refer, in which this liberal, and even strained, interpretation has been adopted for the consummation of this paramount purpose. There has been a progressive development of constitutional interpretation steadily tending toward this end, and the last point for contention left to those who by technicality and refinement would obstruct this purpose is the ground upon which objection is made to the present credentials, that appointments can not be made when the vacancy occurs during the session of a legislature which had an opportunity to fill it. One further ground, also, not involved in this case, still remains, and that is that the power of executive appointment is exhausted in one performance of it. I feel confident that in the end the decision and the practice of this Senate will be to complete the progress of constitutional interpretation and recognize that all vacancies may be filled when the legislature is not in session, and that the exercise of the power of executive appointment can be repeated as often as vacancies occur. The most lucid and logical method of understanding the question would seem to be not to proceed upon some theoretical arrangement of the argument, but to take up, in successive order, each word as it occurs in the disputed clauses of the Constitution and discuss the subject by a consideration of the history of their interpretation.

Clause 1 of section 3 provides that—

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years, and each Senator shall have one vote.

"The Senate of the United States shall be composed of two Senators from each State." In thus constituting the Senate of the United States it is expressly declared that the Senate *shall* be composed of two Senators from each State; it is not declared that it *may* be composed of two Senators from each State; and it is not left discretionary either with the Senate or with any other body that a vacancy shall exist in either one of the two offices of Senator from each State. The proper officials of the various States, impelled by their public duty under their oath of office, are expected to send to this body the full representation from the State. It is the duty of the Senate itself to carry out this evident purpose of the Constitution by aiding and assisting in every way possible. The paramount purpose, in fact, of the Constitution in creating the Senate of the United States, in providing a method of electing its membership and filling vacancies therein is clearly that the Senate shall be preserved in its integrity as a body composed of two Senators representing each State in the Union.

There is every reason to suppose, when we consider the important character of the Senate in the structure of our Government, that the intention of the framers of the Constitution must necessarily have been to make the broadest and most complete provision for the maintenance of its integrity, and that integrity, it is clear, is involved in keeping the Senate full. It is admitted by all that it is desirable that the Senate shall be kept always filled, and the only point of dissension is whether we are to make every reasonable effort to carry out this admitted paramount purpose of the Constitution, or whether we shall, for whatever technical or minor reasons may exist in the mind of anyone, permit that great purpose to be frustrated.

That this purpose to keep the Senate full must have been strong in the minds of the framers of the Constitution is evident when we consider the importance which they attached to the constitution of the Senate. Many conflicting theories prevailed as to the manner in which this branch of the National Legislature should be constituted. Many suggestions were made and considered. The Senate was to be chosen by the first branch of the legislature; it was to be chosen by the State legislature; it was to be chosen by the people; it was to be appointed by the President; it was to be chosen from districts throughout the Union or to be apportioned by the representatives after a census; the power of nomination was to be given to the State legislature; the States were to be represented according to their importance or in proportion to their property; or on a basis of equal representation of the States in the body. It was originally supposed that the Senate would be of aristocratic character; that it would be a restraint on the excesses of democracy, and consist of persons of wealth and influence, with power and ability to resist the encroachments of the Executive. It was supposed that its duration would be for life; that there should be a property qualification; and that many executive functions should be given it, such as the appointment of ambassadors and judges.

When the work had been completed it was found that there were certain purposes in the constitution of the Senate, which have been set forth by Alexander Hamilton in five letters in "The Federalist." They were to conciliate the spirit of independence in the several States by giving each, however small, equal representation with every other, however large, in one branch of the National Government; to create a council qualified by its moderate size and the experience of its members to advise and check the President in the exercise of his power of appointing to office and concluding treaties; to furnish a restraint and check upon the tyranny and mutability in opinion of popular majorities represented more closely in the House of Representatives; to provide a body of men less subject to frequent changes in membership and comparatively free from popular clamor, so that they might constitute an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign states and to preserve a continuity of policy at home and abroad; and, finally, to establish a court proper for the trial of impeachment, a remedy necessary to prevent the abuse of power by the Executive. A Senator is the representative of the sovereignty of the State; he represents the State in its political capacity. Its members in earlier times regarded themselves as a sort of congress of ambassadors from their respective States, and they were accustomed to refer for advice and instructions each to his State legislature.

As a compromise between the advocates of proportional representation and the advocates of States' rights and States' sovereignty, the plan was finally determined on of giving each Senator one vote and each State an equal representation. So strong was the final determination that the Senate should consist of an

equal representation of the States that it was provided in Article V that—

No State, without its consent, shall be deprived of its equal suffrage in the Senate.

Is it not clear, when we consider, therefore, the history of the evolution of the Senate from out of the many diverse and contending theories into the form in which it was finally created, that the framers of the Constitution intended to create what is the most important branch of the whole system of our government—a permanent body existing as an intermediate link between the Executive and the House of Representatives and preeminently an assurance of the continuance and stability of our institutions?

It is hardly necessary to go into details as to the overwhelming importance of carrying out this paramount purpose of the framers of the Constitution in having the Senate kept filled. No technicalities or subtleties should stand in the way of consummating this essentially important end. Any doubts, if such exist, should be resolved in favor of this object, the importance of which is admitted by everyone. The work of a Senator, especially from some of the larger States, is sufficiently arduous and burdensome to render it extremely desirable, in order that the public business of the State may be properly expedited, that the State should be represented by two Senators. The inconvenience to the members of this body incurred by such vacancies is considerable, because the mechanism of the Senate in committee assignments and in other matters pertaining to the conduct of its business is more or less disturbed. The equal representation solemnly guaranteed by the Constitution to each State is imperiled. Even upon broader and wider grounds it can be said that the people of every other State, of all the United States, are interested in having, and are entitled to have, every State in this Union fully represented upon the floor of this body.

It has been argued that we can easily afford to have year after year one or more States but partially represented here, and that no serious or practical inconvenience results. It has been maintained that in some way it is the fault of the State because the State legislature fails to elect, and that the State should suffer therefor, as if no other part of the country had any interest in maintaining the full integrity of the Senate. It might frequently happen that where a majority of the people of the United States had declared one way upon a question and were entitled to be represented by a certain majority of Senators to this body upon that question that the popular will might be frustrated and nullified by the failure of one, two, or three legislatures to elect.

There have been several important cases bearing out this statement. There have been great questions settled in this Senate by a majority of one or two votes. Had the States represented by the Senators in those small majorities been unrepresented or but partially represented, these great questions would have been determined otherwise. The tariff of 1846 was defeated by the casting vote of George M. Dallas, then Vice-President. The impeachment of Andrew Johnson was defeated by 1 vote. The force bill was defeated in the Senate by 1 vote. This very question of the validity of an executive appointment was determined in this Senate in the Mantle case by a vote so close that but for a misunderstanding regarding certain pairs it might have been determined otherwise and exist to-day as a precedent in favor of the present appointment. Other equally notable instances might be cited.

While a Senator is primarily a representative of an organized political constituency, representing the government of a sovereign State and possessed with high executive functions, he at the same time is a member of a legislative body, and, as such, under broad interpretation of the duties and functions of a member of such a body, represents after his entrance into this Senate not alone the State which has sent him here, but the people of the United States; and he has imposed upon him the duty to represent them conscientiously and faithfully; while the people, also, have a right to look to him as well as to their own representatives and have an equal interest in having the Senatorial position filled. When we contemplate the rapidity of our growth and the vast population which will in the lifetime of many of us occupy our domain, the far-seeing statesman can not fail to realize the importance of exercising every precaution calculated to maintain unimpaired all of the coordinate branches of this Government as established by the Constitution.

It is somewhat remarkable, as I have already stated, upon a study of this question to develop the fact that the progress of interpretation of this provision of the Constitution regarding the Senate of the United States has been continually in the direction of carrying out this paramount purpose to which I have referred, and which must be obvious to all. Step by step this progress has been met by the narrow, technical, and reactionary spirit which has exhibited itself in other branches of constitutional development. Every word in the two clauses above quoted has been interpreted and even strained to carry out this purpose against opposition of this character. One of the last points left for this reactionary sentiment to contend over is this question of the validity of Executive appointments. As we proceed to interpret the meaning of the constitutional provisions relative to the Senate, let us also consider how these words have been interpreted with the paramount object in view of facilitating the election of Senators and promoting the purpose of maintaining the integrity of the Senate. Two striking instances are found in the very next words of this clause.

The very next words in clause 1 of section 3, coming after those already quoted and explained, namely, the words "chosen by the legislature thereof, for six years," have been interpreted not as their strict and literal meaning would indicate, but with a liberal, reasonable, and fair desire to carry out the purpose of the Constitution.

If the narrow construction which is applied by Senators on the other side of this question should be applied here and the literal rendering of these words should be taken, the legislature of a State would have no authority to elect for a term of less than six years. Consequently, where the legislature failed to elect a Senator prior to the expiration of a term, the term having commenced, they could not fill such vacancy by election, because the election would not be for six years, but for a less period than six years; and doubtless it would be argued that the legislature having failed in its duty to provide in advance for filling the office of Senator in ample time before the beginning of the term, the State should incur the penalty for such delinquency by being unrepresented until a new term came round. But those who delight in technicalities and quibbles have hardly gone this far in applying this rendering to these words. While literally only authorized to choose Senators for a term of six years, legislatures continually choose Senators for lesser periods of two, three, or four years, or whatever may be the balance of the Senatorial term for which they may elect, and this departure from a literal rendering of the Constitution has been a proper interpretation of the purpose of the Constitution that the Senate of the United States should be kept filled.

The second instance found in the words referred to in clause 1, in which the literal meaning of the Constitution has been still further strained in order that the election of Senators might be facilitated, is strikingly shown in the manner of choosing Senators. The Constitution declares that they shall be chosen by the legislatures of the States. It would seem clear from this language that the requirement of the Constitution in regard to the election of Senators would not be complied with unless its members were elected by the legislatures of the several States in the same way that laws are passed by the concurrent act of the two branches, approved by the executive, or at least by elections held separately in each independent legislative chamber. But the practice long prevailed, and was silently acquiesced in by the Senate, of electing its members by joint ballot of the two branches of a State legislature, in which the members constitute one aggregate body, and in which the less numerous branch is dissipated and lost in the larger. This practice has now been established by the act of Congress of 1866, and while its constitutionality has been questioned, for all practical purposes it is now too late to call into question this mode of election.

So far as most of the States are concerned this legislation by Congress has been affirmed by State legislation; nevertheless, as it is not competent for the members of a legislative assembly to do any ordinary act of legislation by proceeding in joint ballot, an election effected by the members of the legislature in that manner can not properly be said to be the choice by the legislature. Perhaps there could be no greater evidence from the point of view of the Senators upon the other side of this question of a strained and almost violating interpretation of the Constitution, made and acquiesced in to facilitate the election of Senators that the Senate may be kept filled, than is afforded by this instance. Chancellor Kent says in his commentaries that if the question was a new one it might well be maintained—

that when the Constitution directed that the Senators should be chosen by the legislature it meant not the members of the legislature per capita, but the legislature in the true technical sense, being the two houses acting in their separate and organized capacities, with the ordinary constitutional right of negative on each other's proceedings. (Kent's Commentaries vol. 1, 225.)

The final words of clause 1 of section 3 are:

and each Senator shall have one vote.

The fact that the States of this Union are here upon an equal basis is one of the striking features of the constitution of the Senate. It is an element for conservatism in the construction of our Government, however much it might have been the result of a necessary compromise. Every patriotic American, to whatever State he may belong, should have an interest and a pride in the success and welfare of each of the splendid sovereign Commonwealths that constitute our Union. No jealousy or cavil at this equality of representation should be felt. Those small States of the original thirteen which formed this Government are entitled to be here because they equally with the other original States helped to achieve our independence and are entitled to maintain their partnership in this Union, even if it can not be expected that they will ever on account of physical conditions, again cope

in actual equality with the larger Commonwealths. Those newer States, splendid in their size and in their fertility and possessing brilliant possibilities, while smaller in population at present than some of the older Commonwealths, give promise of becoming at no distant day the seat of empire. At the same time the fact can not be forgotten that a State like Pennsylvania, with some seven million people and with thirty Representatives at the other end of the Capitol, is here in this Senate placed on an inequality with other States which may have but one, two, or three Representatives in the House.

That such a penalty should be inflicted upon our people for no fault of theirs is unjust and unsufferable. To attempt to assert that a State must suffer in this way by partial representation simply because a State legislature, through causes absolutely beyond the control of the people of the State, and even beyond the control of the legislature itself, failed to elect a Senator, and that the State must therefore go but partly represented, is a proposition that will not be long tolerated by practical men, however much such refinements may delight the student and the lawyer; and the inconvenience and the injustice become all the more intolerable when it is felt that the Constitution has provided ample means to insure to the State full representation. Great communities and great interests will not long permit their rights to be frittered away and imperiled by arguments of this character.

I have carefully gone over seriatim the words of clause 1 of section 3 of article 1, and it will be difficult to detect a purpose so far of any opening for objection to the validity of executive appointments. On the contrary, it is evident, in view of the paramount purpose of the Constitution and the express words of the provision itself, that every effort should be made to promote the preservation of a full Senate, and in two cases to which I have referred, the words have actually been strained, and properly so, to secure the purpose.

I shall now proceed to consider briefly that part of clause 2 of section 3 which reads as follows:

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year.

We herein reach the first word involved in the dispute. The words "vacated" and "vacancy" are the subjects of the argument. Certainly, there can not be any doubt about the meaning of the word "vacated" in this conjunction. It is distinctly stated by the words of the Constitution that the seats of Senators are vacated at the expiration of the term for which they are elected. In the beginning these terms were determined by lot. After they have been once established, they are vacated at the expiration of the terms, which will occur upon days fixed and certain.

There can be no difference of opinion as to the meaning of the Constitution in the use of the word "vacated." The Senatorial term is "vacated" at the expiration of the term. The seat being "vacated," the logical consequence is that there is a vacancy. A vacancy should originally be filled by the legislature by the election of a Senator for a full term of six years, as we have seen; but where that does not occur or can not occur for any reason, the office remains "vacated." A vacancy exists, and the purpose of the Constitution is that it shall be filled, by election by the legislature, for the full term, or by temporary executive appointment until the legislature meets. It was an old contention, and, in fact, it was the first limitation attempted to be set up against the right of the governor to appoint, that the governor could not appoint to fill a vacancy happening at the beginning of a Senatorial term. "Happen" was construed to mean a vacancy happening in a term after that term had once been filled. This view undoubtedly prevailed at one time, but, as a matter of fact, the Senate has allowed many appointments by governors at the beginning of Senatorial terms.

Beginning with the case of Cocke, of Tennessee, in 1797, and coming down to the case of Pasco, of Florida, in March, 1893, there have been thirteen cases in which the governor has appointed a Senator to take his seat at the beginning of a Senatorial term, and in each case the Senator has been admitted to his seat. By these precedents, therefore, the Senate has utterly destroyed the old notion that a vacancy can not possibly happen in a term unless that very term has once been filled. The ingenious reasoning by which a term vacated by its expiration was declared to be not vacant because it had never once been filled, illustrated by many arguments, is now of little interest except as marking the futility of such abstruse speculations, and as indicating another stage in the progress of a liberal construction of the Constitution in order that the Senate may be kept filled.

The remaining paragraph of the clause already quoted reads as follows:

And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Almost every word in this simple paragraph has been the subject of argument and of refinement and speculation. The contention begins over the word "vacancy." It was obvious to the framers of the Constitution that vacancies might occur which would defeat the intention of always having two Senators from each State, and, therefore, we find this provision. Legislatures might not be in session, and vacancies might naturally be expected to occur at such periods. It might be inconvenient and needlessly expensive to call a session of the legislature for a special session prior to the time of its regular meeting, and, therefore, it was provided that the executive might make temporary appointments, and it is under this part of the clause last quoted that the governor of a State derives his power to fill vacancies, regardless of any State constitution or law.

To the ordinary man it is clear that "vacancy" is the state of being empty or unfilled. The natural and common-sense meaning of the word "vacancy" as applied to an office is that any office without an incumbent is vacant, within a proper legal or constitutional construction. Such an office is certainly not filled, and no incumbent exercises the functions of the office. If it is not filled, in what condition does it exist, if it is not vacant? Black and Bouvier define the word "vacancy" to be "a place which is empty." Webster defines it as "the state of being destitute of an incumbent." In fact, it may be very seriously questioned whether any authority can be cited upon which a lawyer would be willing to rely that takes a different view of the question. In the light of every authority the word "vacancy" applies to every office without an incumbent which the governor has the power to fill, no matter how the vacancy is created, so that the conclusion necessarily forces itself upon us that the governor has the right to fill any vacancy that may happen from any cause which exists after the legislature has adjourned.

John Quincy Adams stated that he believed in relation to offices that every one happens to be vacant which is not full, and that, he believed, was the meaning and sense of the Constitution whether the vacancy occurred from casualty, the regular course of events, the expiration of term, or other cause. I take it that there can be no dispute among sensible men as to the meaning of the word "vacancy," if we take it standing alone. It refers to an office, as I have said, without an incumbent; and taken in connection with the similar word already referred to and used a few lines above, the word "vacated," it is clear that upon the expiration of a Senatorial term the office is vacated and the vacancy exists.

So far, therefore, in our progress in reading the words of the Constitution, there would seem no ground for dispute. But we approach the next word, and there the opportunity is apparently given for the flood of argument and disquisition which has obscured this subject. The vacancy must "happen." Those who deny the power of the governor to fill the present vacancy give the word "happen" a restricted, technical meaning, and say that it refers only to the point of time at which the vacancy began. This point of time, it is alleged, is momentary and connected only with the beginning of the event. It is stated that the word happened means originated, and it is argued that in this sense alone the word "happen" was used. An attempt is made sharply to define the word "happen" and to deny that it covers any part of the duration of the event happening. This construction, however, of the word "happen" is forced and technical. It disregards some of the most ordinary uses of the word "happen," which include duration of the event.

I hesitate to go into the battle of dictionaries which has been witnessed time and time again upon the floor of this Senate. There is not a dictionary of received authority that does not define "happen" as being "to take place; to come to pass; to be met with; to fall out; to meet with." Examples need not be multiplied to show that at least one of the common-sense meanings of the word "happen" includes not only the first moment the event happens or begins, but also the duration or continuance of the same. The word "happen" is frequently used with other words to express a continuing condition. A certain condition happens to prevail, or happens to exist, or happens to be, or happens to take place, but the additional words are not necessary, so frequently are they associated with the word "happen," and one of the most common uses of the word is to express this continuing condition. If, then, the word "happen" means not only the moment of first occurrence but also the duration of the event, which definition should be given to it in defining this clause? The answer must be, whatever gives it the broadest and most liberal meaning. The reasons greatly preponderate in favor of the broader, more conclusive meaning, than of the strictly technical one.

Without, however, proceeding further for the present with the consideration of this word "happen," to which I shall subsequently recur, let us proceed to the next four words, "by resignation, or otherwise." And here again we strike the contention that not only must the vacancy be fortuitous, as the result of unforeseen casualty, or accident, but that it is actually restricted by

the words of the Constitution to vacancies occurring by resignation or some similar cause. These words are held to be words of restriction. It is said that the word "otherwise" does not mean "otherwise," but "likewise," and that the vacancy must be of a similar character to that of the resignation. Difficult as it may be to detect any similarity, vacancies caused by death are arbitrarily placed in the class of those similar to vacancies caused by resignation or vacancies caused by expulsion, notwithstanding the fact that the one is voluntary and the other two are involuntary. Expulsion for cause is a vacancy similar to resignation according to this arbitrary classification, although some grave doubt has been raised as to whether a person incapacitated from insanity would properly come within this classification.

Vacancies caused by defects in State constitutions or by the determination of a Senatorial term by lot are welcomed as approaching in character those due to death, expulsion, or insanity; but the arbitrary line is drawn on one of the most unexpected and uncontrollable contingencies which usually happens in modern times, the inability of the legislature of a State to elect a Senator. It must be borne in mind that the plain language of the Constitution does not classify vacancies for the purpose of making temporary appointments or permanent elections. The Constitution does not specify that certain kinds of vacancies are to be filled by temporary appointments and certain other kinds by permanent elections. These classifications are arbitrary ones, made by those who seem determined to make every effort to find some loophole through which States can be deprived of their representation in this body on some occasions.

Those who take a technical view of the Constitution hold that the words "resignation, or otherwise" are words of limitation, and that the word "otherwise" is intended to indicate a vacancy which happens in some such manner, as by resignation. Those who take a broader and more liberal view of the Constitution contend that the word "otherwise" is intended to cover every other kind of vacancy that may happen and exist than by resignation. It is a cardinal rule in the interpretation of constitutions that the instrument must be construed to give effect to the intention of the people who adopted it.

"Never forget," said Chief Justice Marshall in McCulloch *vs.* Maryland, "that it is a constitution we are construing." It has been frequently decided that the words in a constitution are to be taken in their natural and popular sense, unless they are technical legal terms, in which case they are to be taken in their legal signification. The words "resignation, or otherwise" are not technical legal terms, and therefore do not come within the purview of the exception to the general rule. The general rule of construction certainly must apply to the words "resignation, or otherwise." The popular as well as the philological meaning of the word "otherwise" is "other ways," and, if this rule is to be applied, it would seem as though there could be no doubt what the word "otherwise" means as used in the Constitution.

Senator Edmunds, in a very able presentation of the Bell case, among many other striking points made, stated the rule as follows:

> The Constitution is speaking of vacant offices, and not of the incumbent at all except in the first place. There is where the Senator from Georgia and I appear to differ. The Constitution is looking to have each State represented in this body all the time, and by some method the Constitution provides and looks to do it; and, therefore, when it uses the word "otherwise" it uses a comprehensive term, so that in whatever way a State ceases to have opportunity to express its full voice here in this council of States, it shall be filled up temporarily by the governor until the legislature, the chief and sovereign power in the State, at its next meeting, can have an opportunity to fill it.

It is admitted that in the consideration of constitutional questions too much weight can not be attached to citations from the debates in conventions. They are of value as showing the views of individual members and as indicating the reasons for their votes. They do not, however, give us any light as to the views of the large majority who did not speak. It is a recognized principle, therefore, that in the end the Constitution must be construed from what appears upon its face. At the same time the evidence which we find in the Debates of the Federal Convention regarding the question as to whether or not the words "resignation, or otherwise" are words of limitation is so clear and to the point and so absolutely corroborative of the plain and evident reading of the objects of the Constitution that it is essential to refer to it. As a matter of fact, the original draft of the Constitution did not contain the words "by resignation, or otherwise." The report of the Committee of Detail, as set forth in the Debates in the Federal Convention, section 1, article 5, reads as follows:

> The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.

Several interesting points are found in the Debates upon this section and every one bears out the argument contended for as to the validity of gubernatorial appointments. Mr. Wilson, of Pennsylvania, objected to vacancies in the Senate being supplied by the executives of the States. He thought it removed the appointment too far from the people, the executives in most of the States being then elected by the legislatures. As he had always thought the appointment of the executive by the legislative department wrong, so it was still more so that the executive should elect into the legislative department. Thereupon Mr. Randolph declared that he thought the provision necessary.

In order to prevent inconvenient chasms in the Senate—

He went on to say—

> in some States the legislatures meet but once a year. As the Senate will have more power and consist of a smaller number than the other House, vacancies there will be of more significance. The executives might safely be trusted with the appointment for so short a time.

Mr. Ellsworth was evidently impressed with the same idea, that some means must be provided so that the Senate should always be full. He called attention to the fact that the executive "may supply vacancies." When the legislative meeting happened to be near, the power would not be exercised. "As there will be but two members from a State," he said, "vacancies may be of great moment." On the question of striking out "Vacancies may be supplied by the executive" the amendment was defeated by a vote of 8 to 1. There could be no more striking illustration than is found in this portion of the debates as to the paramount idea in the minds of the framers of the Constitution that the Senate should always be kept full by their making complete provision for temporarily filling vacancies when the legislature was not in session. The question then arose in the debates, raised by Mr. Madison, whether resignations could be made by Senators, and he moved to strike out the words after "vacancies" and insert the words:

> happening by refusals to accept, resignations, or otherwise, may be supplied by the legislature in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature.

Mr. Madison, perhaps, had in mind the case of a member of the English Parliament who could not resign, and in order to give up his office he was obliged to accept the stewardship of the Chiltern Hundreds, a nominal position, which, however, afforded the legal pretext. May says in his Parliamentary Practice (pages 637, 638):

> It is a settled principle of parliamentary law that a member, after he is duly chosen, can not relinquish his seat; and in order to evade this restriction a member who wishes to retire accepts office under the Crown, which legally vacates his seat and obliges the house to issue a new writ. The offices usually selected for this purpose are those of steward or bailiff or Her Majesty's three Chiltern Hundreds of Stoke, Desborough, and Bonenham, or of the manors of East Hundred Northstead or Hempholme, or of escheator of Munster, which, although they have sometimes been refused, are ordinarily given by the treasury to any member who applies for them, unless there appears to be sufficient ground for withholding them, and are resigned again as soon as their purpose is effected.

But, however this may be, there was a real and important reason for this provision, stated clearly by Gouverneur Morris, who declared the amendment absolutely necessary, otherwise members chosen to the Senate would be disqualified from being appointed to any office by section 9 of the article then under consideration. It would be in the power of the legislature by appointing a man as Senator against his consent to deprive the United States of his services. Mr. Madison's motion was agreed to. As the Constitution was finally worded, "refusal to accept" was stricken out and the simple words "by resignation, or otherwise" retained as reported from the committee on style and arrangement. This committee on style and arrangement did not have any authority to add new matter or to change the substance of the provisions of the Constitution, their office and their only office being to perfect the style and arrangement of the instrument. Having rewritten what had been agreed to by the Convention, the committee must necessarily have adopted the final phraseology as the best to express what the Convention had agreed to upon the motion of Mr. Madison. To express it in other words, the committee on style and arrangement must have intended that the words "by resignation, or otherwise" should cover all the subjects as expressed in the motion of Mr. Madison.

It certainly, therefore, seems beyond any cavil or dispute that the framers of the Constitution were impressed with the necessity of keeping the Senate full, and with the grave inconveniences arising from having chasms in the representation. For this reason, and for the better protection of the smaller States, they deliberately put into the original draft of the Constitution the provision authorizing the governor to appoint in case of vacancies, although against the protest made at the time by Mr. Ellsworth, who was opposed to giving this power to the executives. Subsequently the doubt was raised as to whether Senators could resign. This was considered a very serious question, because it was provided in the original draft of the Constitution that Senators should be disqualified for holding office for a certain period, and it was thought that the legislature, by electing a person against his will as a Senator, might thereby disqualify him from holding important offices. These reasons, and these reasons alone, were the cause of putting in the words "by refusal to accept, by resignation, or otherwise." The words "Refusal to accept" were stricken out for the sake of brevity and conciseness, evidently, and the words "by resignation, or otherwise," were retained. It is evident that "resignation" was put in, not as a limitation upon

the character of the vacancy, but to recognize a right to resign, regarding which a question had been raised, and then the word "otherwise" was deliberately added to include all vacancies, indicating as plainly as English language can indicate anything that no limitation was intended, but that resignation being recognized as a right, every other form of vacancy was subsequently included by the succeeding word.

The next words in clause 2 of section 3 of the Constitution, already referred to, namely, "during the recess of the legislature of any State," have likewise given rise to dispute. Even here we are struck with the fact that it has been necessary to apply the most liberal construction to these words in the Constitution in order to keep the Senate full, because if we held to the literal, technical rendering there would be many vacancies in this body continually. The word "recess" is applied to the interval of time in which the event must happen. Webster defines recess as an "intermission, as of a legislative body, court, or school." It means a temporary suspension, as distinct from an adjournment sine die, and contemplates a foreseen reassembling. Now, a legislature generally adjourns sine die without the intention of reassembling, the period for which most legislatures, under modern constitutions, are permitted to sit being limited in time. When the legislature adjourns, there can be no intention of reassembling. The legislature is unable to reassemble of its own volition, and the only possibility of its being recalled during the latter period of its legislative life is upon the call of the executive. The adjournment sine die, therefore, is not technically a recess in its narrow sense.

If we are compelled to take the narrow meaning of the word "recess," and if the word "happen" must be restricted to the point of time at which the event began or originated, as is claimed by those who dispute the validity of these executive appointments, then you have the inevitable result that the governor can only appoint when a vacancy happens in a recess of a few hours or days of a session; he can not appoint at all when it happens after an adjournment sine die. No one contends for a moment for this technical construction of the word "recess." Yet such a contention would be no more narrow, no more technical, no more strained, than that which is striven for to restrict the word "happen."

Can the Senators on the other side of this question explain how they can decently, without wrenching their consciences, depart from the primary meaning of the word "recess" and adopt its secondary meaning? Can custom, or use, or practical necessity be the reason that their feelings are so blunted to this irregularity? In fact, the interpretation which has necessarily been put upon the word "recess" is hardly even consonant with the use or modern meaning of the word, which is after all really in accordance with the definition already cited from the dictionary; but that interpretation has been placed upon it and acquiesced in since the foundation of the Government, that the great, paramount purpose of the Constitution might be carried out of keeping the Senate full; and yet we are met with refinement after refinement, technicality after technicality, spread around the word "happen." The opponents of the governor's right, in other words, would set up the arbitrary distinction that the vacancy must actually begin during the recess of the legislature, the word "happen," according to their contention, being necessarily confined to what they call its primary meaning, as involving a fortuitous event, and "resignation, or otherwise" being considered words of restriction. The arbitrary distinction is then set up that the vacancy must actually begin during the recess of the legislature. This interpretation clearly perverts the intention of the Constitution.

As already explained, the vacancy happens; it exists; it is an actual condition. The recognition is distinctly made that Senators can resign, and that in that case, and in the case of all other vacancies, appointments may be made. The actual condition of the vacancy continues during the recess of the legislature, whether it began while the legislature was in session, before the legislature ever met, the day of its final adjournment, or after such final adjournment. What object could the framers of the Constitution have had to restrict the governor to filling vacancies only when the vacancy originated or began in a recess and not to include a vacancy which began before but continued into the recess, and while every word and act of theirs in debate and in every word of the Constitution would indicate their paramount purpose of providing for the filling of vacancies in the Senate in order that it might be kept full? They could easily have used the phrase "if vacancies should begin or originate in recess," and their meaning would have been clearly defined.

The succeeding words of this much disputed clause are:

> The executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

It will be observed, in the first place, that the executive "may" make these appointments. It is not mandatory upon the executive. He will be supposed to use his reasonable discretion in the exercise of his power. It was presumed by the framers of the Constitution that if the legislature should happen to meet very soon after the occurrence of such a vacancy the power might not be exercised. In the interpretation placed upon the words "until the next meeting of the legislature" we have another striking illustration of the liberal construction which has been put upon this part of the Constitution in order to keep the Senate full. Technically speaking, the words "until the meeting of the legislature," taken in their narrowest sense, would mean until the day the legislature meets, and then the question might well be raised as to whether this restriction of time applied to the period during which the temporary appointment would go or defined the period during which the governor might exercise the power of appointment.

It can be assumed that as far as the word "until" applies either to the governor's power or to the temporary term, it can be construed to apply to both. The temporary appointment lasts until the meeting of the legislature, and the governor, of course, can only exercise the power of appointment until the meeting of the legislature. But the striking point is that the word "until" has been interpreted in its most liberal sense not to be confined to the day of the meeting of the legislature, but to continue through the session of the legislature until the day of its adjournment sine die, or until an election for Senator is accomplished. There can be only one object for this interpretation of the word "until," and that object is apparent that there should not be an inconvenient chasm in the Senate between the first day of the meeting and organization of the legislature and the period of greater or less extent which must necessarily elapse before a Senator can be elected. In the case of Samuel S. Phelps, the minority report of the committee, which was finally adopted, declares:

> Perhaps it would have been as well if the strict and literal meaning of the words "until the next meeting of the legislature" had been observed on the first occasion in which their construction was brought into question; that would have had the merit of certainty, but a certainty that might have been too severe for the true and liberal intendment of the framers of the Constitution. They certainly did mean to say that the executive appointment should terminate when legislative jurisdiction shall commence or be exercised. To give this severe construction to the words quoted would in all cases leave a State unrepresented for a time, and dependent on legislative action. Rather than hold to that result the Senate, under the precedents quoted, seemed to have regarded the "next meeting of the legislature" as synonymous with the next session of the legislature, during which time the member under executive appointment might hold his seat, unless it should be filled by an election before the termination of a session; and this was probably an analogy to that provision of the Federal Constitution by which power is vested in the President to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.

It was thought at the time that the Senate went very far when it gave an interpretation to the words referred to beyond their literal meaning limiting the term to the day of the meeting of the legislature. This construction met with a decided opposition from a respectable minority. The construction put upon these words is a striking illustration of the thought paramount in the minds of all, that the great purpose of the Constitution must always be kept in view, that the Senate should be kept full—always full.

What vacancies can the legislature fill at its next meeting? The Constitution says all vacancies that the executive did fill or could have filled by temporary appointment. This is clearly indicated through the whole context of the provision in reference to the filling of vacancies and especially by the use of the adjective "such." What vacancies are meant by the words "such vacancies"? The vacancies mentioned in the first part of the clause; that is, vacancies that happen "by resignation, or otherwise" and which the executive has the right to fill by executive appointment. The word "such" is defined by the Century Dictionary to mean—

> 1. Of that kind; of the like kind or degree; like; similar.
> 2. The same as previously mentioned or specified; not other or different.

So that when the word "such" is used before the word "vacancies" in the latter part of the clause, it means the same kind of vacancies mentioned in the first part of the clause in reference to executive appointments. It therefore appears that there can be no vacancy filled by the legislature that could not, in the first instance, have been filled by executive appointment. It is admitted that the legislature can fill all vacancies, no matter how created, and it therefore follows that the governor can fill, by temporary appointment, the same kind of vacancies. The vacancies to be filled by executive appointment are as broad as the vacancies which can be filled by election.

In other words, the Constitution of the United States clearly intended to create a Senate, and to have a Senate implies that the membership of that Senate shall be represented in full, in every principle of justice to the people and protection to the smaller States. To provide for the creation of that Senate it was distinctly declared that the Senators should be chosen by the legislatures, and in order to meet every possible emergency it was also provided that in case of vacancies the governor should appoint. Each authority is equal in its respective sphere; one is neither inferior nor superior to the other. The object of the Constitution was that the States should be represented, and for that purpose,

and in order to avoid every possible contingency of partial representation, or, perhaps, an absence of representation the Constitution created two methods of constituting Senators, namely, by election for a full term or the remainder of a term and by temporary appointment. The former was vested in the legislature of the State and the latter in the governor. The powers of each are separately and distinctly given; they are independent powers. The governor has nothing to do with elections; the legislature has nothing to do with temporary appointments. The legislature is to elect and the governor is to fill temporarily vacancies, however occurring, and by these two means the self-evident purpose of the Constitution in creating the Senate is to be accomplished—that the Senate should be kept filled. Any other interpretation is not to carry out, but to defeat the constitutional intent.

To argue that the Constitution, which created a Senate and exercised every precaution that the States should be fully represented, meant to deprive a State of a Senator and take from the governor his power of temporary appointment, merely because the legislature failed to elect, is to maintain that the framers of the Constitution intended to punish not only the State which might be involved, but all the people of the United States, by reason of such restriction. There might be some ground for apprehension if the governor appointed for the balance of the term, but his appointment is only at the most for a few months, a temporary appointment expressly provided for in order to prevent an inconvenient chasm in the Senate, the integrity of whose organization has been promoted and facilitated by the liberal interpretation which has been placed upon almost every other word in the Constitution bearing upon the United States Senate. A temporary appointment by the governor, therefore, creates a Senatorial commission of force and validity and authority fully equal to an election by the legislature. In fact, as already observed in reference to the method of balloting for Senators, the governor is a constituent part of the legislature of a State. It is true that he is not included in State constitutions under the article on the legislature, but under a separate article on the executive; but that is because his executive functions form a distinct branch of our system of government and require a separate article. The fact remains, however, that his approval is needed to every act of the two houses of the legislature.

The tendency of modern constitutional regulations, indeed, has been to increase still further his position and influence in the extension of the veto power, so that its exercise has assumed almost the character of actual legislation. A striking illustration of this extension is the power given to the governor in many States to veto an item in an appropriation bill, instead of being restricted, as heretofore, to the approval or disapproval of the whole measure, thus giving the governor more power over the disbursements of the State than either or both of the two houses of the legislature. So important is the governor in the coordinate branches of the legislature that he has generally come to be looked upon by the people as a protection against the legislature, which frequently is corrupt and controlled by corporate or political influences. Where there are many men responsibility is divided and no one man can have concentrated upon him the responsibility for bad or unpopular public acts. Therefore, there is no such responsibility about a legislature as there is about an executive. Upon the executive is concentrated the criticism of the whole community for all public acts, and this is found to be a wholesome restraint in the interests of good government, however evilly disposed an executive might be.

So far has this development of modern American law progressed that the tendency has been to restrict legislatures by limiting their sessions to once in two or four years, and by taking from them a very large part of those general powers which attach to the legislative body as representing a sovereign State. Special legislation has been abolished. As many matters as may possibly be performed through general laws and the instrumentality of courts have been relegated thereto; while the executive, on the other hand, has had his power increased and extended. Particularly is this true in our municipalities, where the concentration of all patronage and power in the hands of a single executive and the fastening upon him individually of the full responsibility for the administration of municipal affairs is a modern tendency of municipal legislation. The governor of a State appoints judges, and many other State officers. It is argued that he may appoint a favorite to the senatorship. He is no more likely to appoint a favorite to the senatorship than to make any other important appointment for the same reason. As a rule, the governor will represent a majority of the people, and in most cases a majority of the legislature. It is said that a clique may hold up the legislature in order to throw the appointment into the hands of the governor, but, as a matter of fact, the power of a clique, under the act of Congress of 1866 providing for the election of Senators by requiring for such election a majority of all the members of the legislature, is directly promoted by the provisions of this act.

In this connection I will state that in my opinion a large part of the difficulties encountered by legislatures in coming to an agreement upon the question of electing a United States Senator arises from that provision in the act of 1866 which requires a majority of the whole legislature to elect a Senator. In almost every other branch of our political system a plurality is sufficient to elect. A plurality of the citizens elects the members of the legislature themselves, the governor of the State, and all other officers. It would seem as if a plurality would be sufficient to elect a Senator by a legislature. The act of 1866 was a compromise upon the original intendment of the Constitution. It would seem as if a Senator must be chosen as a legislative act, and it was consequently provided that the first effort to elect should be made by the two houses separately. Then the scheme of a joint ballot was adopted as the only practical way to accomplish an election after each house had failed to cast a majority for the same person in their separate capacities. It was necessary to strain the meaning of the Constitution in order to form a practical method of electing Senators. The difficulty involved in the requirement of a majority to elect is that it places the control of the legislature in the hands of one, two, three, or more persons, who, by holding out, are frequently enabled to dictate their own terms or to prevent the election of a Senator.

I believe that there is a bill now pending before Congress, introduced by the distinguished senior Senator from Massachusetts, which, among other provisions, does away with the requirement of a majority. While it is to be admitted that certain abuses can arise under the requirement of a mere plurality, such as the possibility that the minority in a legislature might elect a Senator where the majority might be divided into two factions, which were unable to agree, yet, upon the whole, it would seem as if some method which would permit an election of some kind would tend in the end to the coherence of whatever party might be in the majority in the legislature, and in any event would permit the election of a Senator, which is now frequently really impossible where three or more separate parties or factions exist in a legislature, each widely, and at the same time often sincerely, disagreeing with each other and utterly unable to come together.

There are two other cases in the Constitution in which vacancies are referred to, and the interpretation which has been placed upon the word in these two instances is full of instruction for the construction of the word "vacancies" in connection with the filling of vacancies in the United States Senate. Clause 3 of section 2 of article 2 of the Federal Constitution provides:

> The President shall have power to fill up vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.

At a very early date the question was raised whether or not, under this provision of the Constitution, the President had the right to fill up a vacancy that had occurred by expiration of the full term or in any other manner while the Senate was in session, which vacancy, not having been filled, continued to exist during the recess of the Senate. The construction placed upon this provision by numerous Attorneys-General of the United States and by the courts very largely aids in arriving at a proper construction of this constitutional provision authorizing the governor to make temporary appointments. On the expiration of General Swartwout's commission as Navy agent at New York, while the Senate was in session, the President nominated another person to fill the vacancy and sent the name to the Senate for confirmation, which was not made before the Senate adjourned. The vacancy continued to exist during the recess, and the President asked the Attorney-General whether he had the right to fill the vacancy by temporary appointment until the end of the next session of the Senate. Attorney-General Wirt, in a well-considered opinion, held that it was a vacancy within the meaning of the Constitution, and that it could be temporarily filled by an appointment by the President. In this connection he discusses the use of the word "happen" and says, among other things:

> The doubt arises from the circumstances of its having first occurred during the session of the Senate. But the expression used by the Constitution is "happen"—"all vacancies that may happen during the recess of the Senate." The most natural sense of this term is "to chance; to fall out; to take place by accident." But the expression seems not perfectly clear. It may mean "happen to take place"—that is, "to originate," under which sense the President would not have the power to fill the vacancy. It may mean also, without violence to the sense, "happen to exist," under which sense the President would have the right to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me the most accordant with the letter of the Constitution, the second the most accordant with its reason and spirit.

The Attorney-General goes on to say:

> This seems to me the only construction of the Constitution which is compatible with the spirit, reason, and purpose, while at the same time it offers no violence to its language. And these I think are the governing points to which all sound construction looks. The opposite construction is perhaps more strictly consonant with the mere letter, but it overlooks the spirit, reason, and purpose, and, like all constructions merely literal, its tendency is to defeat the substantial meaning of the instrument and to produce the most embarrassing inconveniences.

It would be difficult to find anywhere a criticism more applicable to those who now in their opposition to the gubernatorial

right of appointment are endeavoring to defeat the substantial meaning of the Constitution and produce the most embarrassing inconveniences.

A similar case arose during the administration of President Jackson, in relation to the appointment of a register for the land office for the Mount Salus district, in the State of Mississippi. Attorney-General Taney sustained the right of the President to appoint to fill a vacancy which had "happened" during a session of the Senate, but "existed" after it had adjourned. In that case it was held to be the intention of the Constitution that offices created by law, and which are necessary to the operations of a government, should always be full, and that when vacancies "happen" they shall not be protracted beyond the time necessary for the President to fill them. The Attorney-General, in placing a construction upon the word "happen" as it appears in the Constitution, states as follows:

This appears to be the common sense and natural import of the words used They mean the same thing as if the Constitution had said "if there happen to be any vacancies during the recess." (Opinions of Attorneys-General, volume 2, page 528.)

In the Administration of President Tyler in 1841 the question was again raised, and Attorney-General Legaré took the same view of the Constitution in this connection as his predecessors. It is interesting, however, to note that he even advanced a step further, and advised that the President has the right to make an appointment to fill a vacancy which existed after a session of Congress intervened, to which a nomination could have been made. In the syllabus of that opinion the principle is stated as follows:

The Constitution authorized the President to fill vacancies that may happen during the recess of the Senate, even though the vacancy shall occur after a session of the Senate shall have intervened. (Opinions of Attorneys-General, volume 3, page 673.)

Attorney-General Mason advised President Polk, in 1846, to the same effect, in the following words:

Even though the vacancy occurred before the session of the Senate, if that body, during its session, neglected to confirm a nomination to fill it, the President may fill it by a temporary appointment; and public considerations seem to require him to do so. (Opinions of Attorneys-General, volume 4, page 523.)

Thus not only is the President declared to have the power, but it is declared to be his duty, from public considerations, to see that the public offices are kept filled.

The same question was raised by President Lincoln, with his Attorney-General, in 1862, on the question of his power to fill a vacancy on the bench of the Supreme Court during a recess of the Senate, which vacancy existed during and before the last session of the Senate, and the right of the President to fill such vacancy on the bench of the Supreme Court was sustained by Attorney-General Bates. (Opinions of Attorneys-General, volume 10, page 357.)

Again, in the case of Peter McGough, appointed by President Lincoln as collector of internal revenue for the Twentieth district of Pennsylvania, it was declared by the Attorney-General that where the President made a temporary appointment of a collector of internal revenue during a recess of the Senate, and no nomination was made during the next regular session, or during an extra session called thereafter, that the President, after the adjournment of the extra session, might fill the vacancy by a second temporary appointment. (Opinions of Attorneys-General, volume 2, page 179.)

Thus the power of the Executive was advanced another step, and it was the opinion of the Attorney-General that he could make a second appointment even after the lapse of two sessions of the Senate, to neither of which the nomination had ever been sent. On the same principle the power of a governor of a State to appoint a Senator is inexhaustible. It has been argued that his power is exhausted by its first exercise. On the contrary, he can appoint as often as there is a vacancy. If a legislature again fails to elect, it is his right and duty to appoint again after their adjournment.

One important distinction is to be borne in mind, however. As set forth by Attorney-General Stanbery, in 1866, a distinction is made between a temporary appointment by the President, without the consent of the Senate, and an appointment for a full term, made with the consent of the Senate. A similar distinction obtains between the appointment by an executive to fill a vacancy in the United States Senate, in which the governor does not give full title to the office, but makes only a temporary appointment until the legislature can make an election. The following is the language of the Attorney-General in this connection:

I say by the temporary appointment of the President; for, in strict language, the President can not invest any officer with a full title to the office without the concurrence of the Senate. Whether the President appoints in the session or in the recess, he can not and does not fill the office without the concurrence of the Senate. He may fill the vacancy in the recess, but only by an appointment which lasts until the end of the next session. (Opinions of Attorneys-General, volume 12, page 41.)

Similar constructions have been adopted by succeeding Attorneys-General; by Attorney-General Williams, in 1875; by Attorney-General Devens, in 1877, and by the same Attorney-General in 1880, when he advised the Secretary of the Treasury on the question, raised by the appointment of John F. Hartranft as collector of the port at Philadelphia; by Attorney-General Brewster, in 1883, and by Attorney-General Miller, in 1889, who advised President Harrison that the rule is the same as to the power of the President to fill a vacancy in the case of an office created but not filled during the session of the Senate which had adjourned. In discussing the question, the Attorney-General, among other things, says:

The word "vacancy" in the Constitution refers to offices, and signifies the condition where an office exists of which there is no incumbent. It is used without limitation as to how the vacancy comes to exist. The vacancy may have occurred by death, resignation, removal, or any other cause, but, regardless of the cause or manner of the existence of the vacancy, the power is the same. In the case submitted the law has created the office. The office therefore exists. There is no incumbent. There is, therefore, a vacancy, and the case comes under the general power to fill vacancies. (Opinions of Attorneys-General, vol. 19, page 263.)

The only opinion dissenting from the construction adopted by the Attorney-General was in 1868, when Judge Cadwalader, of the United States district court of Pennsylvania, took a different view of the law. This opinion of the district court has not been followed either by subsequent Attorneys-General or by the courts. Some ten years later, in 1880, Mr. Justice Wood, of the United States Supreme Court, while sitting in Georgia, repudiated the position of Judge Cadwalader in a well-considered opinion, in which he states, inter alia:

The only authority relied on to support the other view is the case decided by the late Judge Cadwalader, the learned and able United States district judge for the eastern district of Pennsylvania. It is no disparagement to Judge Cadwalader to say that his opinion, unsupported by any other, ought not to be held to outweigh the authority of the great number which are cited in support of the opposite view, and of the practice of the Executive Departments for nearly sixty years, the acquiescence of the Senate therein, and the recognition of the power claimed by both Houses of Congress. I therefore shall hold that the President had constitutional power to make the appointment of Bigby, notwithstanding the fact that the vacancy filled by his appointment first happened when the Senate was in session.

This decision further holds that "happens" means "happens to exist" as used in the Constitution. (In re Farrow, 3 Federal Reporter, 112.)

It will be observed that the word "happen" in all of the opinions and cases above cited was construed to be used in the sense of "happens to exist," and it was held to apply to all kinds of vacancies, whether the vacancy happened or occurred by death, resignation, removal, the beginning of the term of a new office, where no incumbent had either been elected or appointed, or the vacancy occasioned by the expiration of the term. No distinction was made in the kind of a vacancy to be filled, and it was uniformly held that the power to appoint was complete when the vacancy happened to exist, without reference to the manner in which or time when the vacancy occurred. It will be observed that no distinction is made as to whether these vacancies occurred prior to a session of Congress or during a session of Congress. In every case, including that of an office newly created, it was held to be the power and the duty of the President to keep the public offices filled. In the opinion of the Supreme Court, already referred to, it was said that this interpretation of the word "vacancy" has been acquiesced in by the Senate, and has been recognized, in fact, by both Houses of Congress. The Senate acquiesces by the mere fact that it gives consideration to such temporary executive appointments, and, in case of official nominations to the Senate, in its act of confirmation it ratifies their legality when it completes the executive act and constitutes the permanent appointment for the full term.

Can Senators adopt two interpretations of the word "vacancy" in the same day, or even in the same hour? Can they apply one interpretation to the word "vacancy" when it occurs in the Constitution in connection with Senatorial vacancies? Can they in open legislative session expound their arbitrary definitions and qualifications and restrictions concerning these vacancies, and, a few moments, perhaps, afterwards, in the secrecy of an executive session, give an entirely different construction to the word "vacancies" in connection with vacancies in offices filled by the President? In fact, we then give the broadest and most liberal interpretation to the word "vacancies" in this latter connection in order that the paramount purpose of good and efficient government and the obvious meaning of the Constitution may be carried out that the public offices may be filled. This principle has been acquiesced in by the House, which has always recognized the authority of officials so appointed to such vacancies, and, in the act of making appropriations for the salaries and expenditures of such officials, distinctly and emphatically acknowledges the validity of their title.

There is a third and last place in which the word "vacancy" occurs in the Constitution, and the construction which has been placed upon it throws considerable light upon the interpretation of the word "vacancy" in connection with Senatorial appointments. Clause 4 of section 2 of article 1 of the Constitution of the United States provides:

When vacancies happen in the representation of any State, the executive thereof shall issue writs of election to fill such vacancies.

A case in point occurred in the State of Rhode Island. William A. Pirce was declared by the general assembly of that State to have been on November 4, 1884, elected a Representative in the Forty-ninth Congress. The National House of Representatives on January 25, 1887, resolved that he was not elected; that the seat was vacant; and that neither he nor any other person received a majority of the legal votes cast at the election on November 4, 1884. This, then, was a case of the people of that district having failed to elect a Congressman. The question was then raised before the Supreme Court, whether, under the provisions of article 1 of section 2 of the Constitution of the United States, already referred to, the governor should issue a writ for a special election to fill the vacancy. It was contended in that case that it was not such a vacancy as was contemplated by the provisions of the Constitution. The Supreme Court held that it was a vacancy within the meaning of article 1, section 2, and the governor had power to issue a writ of election to fill the same. (In re Representation Vacancy, 15 R. I., 621.)

It will be, of course, argued, as it has been in the past, that these cases of vacancies in reference to executive appointments and vacancies happening in the House of Representatives are not similar to those vacancies occurring in the office of Senator. It is said that there are no words of limitation as is found in the provisions regarding Senatorial vacancies in the words "by resignation or otherwise." But, if the argument is good that these are not words of limitation, this objection falls to the ground. It is difficult to see how, except by the most strained construction, Senatorial vacancies are not upon a precisely similar basis as vacancies occurring in an appointive office or in the House of Representatives. The office is vacant; the Constitution of the United States intended that all the offices of the Government should be filled. Some Senator has said in past years that the Constitution abhors a vacancy as nature abhors a vacuum.

It is essential to the very purpose of government that vacancies should be filled. Reference is made to a provision in the constitution of Pennsylvania relative to the filling of vacancies. Article 2, section 4, of the State constitution, provides as follows:

> In case of a vacancy in the office of United States Senator from this commonwealth, in a recess between sessions, the governor shall convene the two houses, by proclamation, on notice not exceeding sixty days, to fill the same.

In considering this provision of the constitution of Pennsylvania, it is observed that the Federal Constitution is the supreme law of the land and of paramount authority in all matters, including the duties of Federal, State, and other public officers. The chief executive of any State can follow any rule of official action prescribed by the Federal Constitution to the exclusion of a different rule prescribed by the constitution and laws of his State. It therefore follows that when a vacancy happens to exist during the recess of the legislature of any State in the office of United States Senator, the executive thereof may make a temporary appointment under the clause of the Constitution which has been so fully considered, until the next meeting of the legislature, even if the constitution of the State provides a different method for the filling of vacancies. Section 2, article 6, of the Constitution of the United States, provides as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

This provision of the Constitution has been from time to time liberally construed by the Supreme Court of the United States. The governor of a State has authority under section 2 of article 2 of the Federal Constitution, which is the supreme law of the land, to fill vacancies that exist, and that authority is supreme and paramount to any State regulation. In other words, the provision of the Pennsylvania State constitution in reference to calling an extra session of the legislature to fill a vacancy in the office of United States Senator can not abrogate or annul the provision of the Federal Constitution under which the executive makes temporary appointments to fill vacancies. It is true that clause 1 of section 4 of article 1 of the Constitution of the United States provides that:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof.

It is to be noted, however, that this provision applies to "elections" and not to "temporary appointments" to fill vacancies. Section 2 of article 1, as we have seen, expressly gives the power of temporary appointment to the governor and not to the legislature. The State legislature does not have, under the Federal Constitution, the power to make "temporary appointments." This power is solely lodged in the governor. As the Federal Constitution is the supreme law of the land, and each governor swears supreme allegiance to it, the Federal and not the State constitution must govern on this question. If, for example, the constitution of Pennsylvania expressly provided that the Governor of the State should not make temporary appointments to fill such vacancies, it is evident that this provision, being directly in conflict with the provisions of the Federal Constitution, would be void, and it would become the duty of the governor, when the emergency arose, to appoint. It is possible to put a strained and technical interpretation on the words in the constitution of Pennsylvania "in a recess between sessions," to the effect that the meaning of this provision was intended especially, and perhaps only, to cover the case of a vacancy that originated after an adjournment. The word "recess" is not used in its unrestricted sense, as in the Federal Constitution, but is limited and restricted by the words "between sessions."

If we are to indulge in the strict and technical construction contended for by the opponents of the validity of the executive appointment now under discussion, there is ample reason for doubt whether under this provision of the constitution of Pennsyvania, the governor of that State had any authority to convene a session of the legislature in this particular case of Mr. Quay. The section referred to provides that the governor shall convene the two houses in case of a vacancy in the office of United States Senator in a recess between sessions, but the present vacancy originated some time before the legislature of Pennsylvania had adjourned. It is, therefore, more than a vacancy in a recess between sessions; it is a vacancy during a considerable period of the legislative session and extending into a recess between sessions. It might be well argued by our strict constructionist friends that the constitution applies only to vacancies originating in a recess between sessions, and that the constitution of Pennsylvania never intended to impose upon the governor of Pennsylvania the necessity of convening a legislature soon after its final adjournment, which had failed after continued and protracted efforts to elect a Senator, and which by the admission of all parties and factions to the controversy could not possibly come together on such a basis of agreement as would bring about the majority required to elect a Senator. In other words, the constitution of Pennsylvania declared that the governor should call an extra session where a vacancy originated while the legislature was not in session, but the constitution never intended to apply this provision to vacancies occurring during the session of the legislature, which the legislature had been unable to fill.

It may be assumed for the sake or argument, however, that the clause does fairly include a case of vacancy originating during a session and continuing after an adjournment. The meaning of the clause, however, can not certainly be to deny to the governor the power committed to him by the Federal Constitution to make temporary appointments. It evidently refers to elections and not to temporary appointments until the next meeting of the legislature. If it does not cover the case of temporary appointments, and takes from the governor the power to make such temporary appointments, and lodges it in the legislature, then it is in palpable and direct conflict with the Federal Constitution and is therefore void, as the latter is the supreme law of the land.

The Federal Constitution does give the State the right to regulate the times, places, and manner of holding elections, but this provision can not affect the right of temporary appointments. In fact, it is evident that the State constitution means that the legislature should be reconvened in extraordinary session to elect for the ensuing term a Senator, but until such meeting takes place it does not in any way affect the validity of the governor's temporary appointment theretofore made. The only question that can arise, therefore, is not as to the authority of the governor to appoint, assuming that we admit such authority, for a vacancy of this character, under the terms of the Constitution of the United States, but whether this Senate is to look into the local question as to whether the governor has properly performed his duty under the constitution of the State of Pennsylvania in calling an extra session of the legislature, in accordance with the terms of that instrument. It would seem as if there could be no dispute as to the proposition that the Senate would not consider this question.

A power granted by the Constitution of the United States can not be interfered with by any State regulation, constitutional or statutory. Therefore, nothing in the constitution of Pennsylvania can conflict with whatever right the governor may have to make temporary appointments, and, as a matter of fact, nothing therein does so conflict. Whether the governor has exercised proper discretion under the State constitution as to calling the legislature is purely a local question for the people of Pennsylvania. As a matter of fact, just when and under what circumstances the legislature is to be convened in extra session for the purpose of filling a vacancy in the office of United States Senator under the constitution of the State of Pennsylvania must be decided by the executive. The power vested in the governor to convene the legislature on extraordinary occasions must always be exercised in a manner to carry out the intent of the framers of the constitution and with due regard to the practical exigencies of the occasion. If, however, any question of construction arises by which it is necessary to decide whether the occasion has arisen for the exercise of this extraordinary power, the executive himself must decide it, and his decision must necessarily be final

and conclusive. Cooley, in his work on Constitutional Limitations, section 41, and following, states the rule thus:

It follows, therefore, that every department of the Government and every official of every department may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction. Sometimes the case will be such that the decision when made must, from the nature of things, be conclusive and subject to no appeal or review, however erroneous it may be in the opinion of other departments or other officers; but in other cases the same question may be required to be passed upon again before the duty is completely performed. The first of these classes is where, by the Constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the Constitution has confided the decision, would be impertinent and intrusive. Under every constitution cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final.

We will suppose, again, that the constitution empowers the executive to convene the legislature on extraordinary occasions, and does not in terms authorize the intervention of any one else in determining what is and what is not such an occasion in the constitutional sense; it is obvious that the question is addressed exclusively to the executive judgment, and neither the legislative nor the judicial department can intervene to compel action if the executive decide against it, or to enjoin action if, in his opinion, the proper occasion has arisen.

The constitution of Pennsylvania provides no alternative mode of calling the two houses if the Governor fails to do so. He is the chief executive officer of the State, and within the scope of executive power his acts are as exclusive as are the judgments of any court. Upon this point I shall quote the opinion of the present attorney-general of Pennsylvania, Hon. John P. Elkin, as set forth in a brief presented by him to the Committee on Privileges and Elections in the present case:

Under the provisions of the constitution of Pennsylvania in reference to the convening of the legislature in extra session for the purpose of electing a person to fill a vacancy in the office of United States Senator, two questions may very properly arise:

1. Whether or not the governor is required to convene the legislature in extra session to elect a person to fill a vacancy in the office of United States Senator, which vacancy occurred during the regular session of the legislature which had the opportunity of electing a Senator, but failed to do so; or, whether this provision of the constitution requires the governor to convene the legislature in extra session for this purpose *only* when the vacancy occurs in the recess and at a time when the regular session did not have the opportunity of making a choice to fill the vacancy.

2. The second question which naturally arises is as to the time when the extra session shall be convened, if convened at all. It is contended, on one side, that the extra session should be convened immediately upon the adjournment of the regular session. On the other hand, it is contended that the governor can exercise a discretion as to the time when the extra session shall be convened; that is to say, it may be called at any time between the adjournment of the last regular session and the meeting of the next biennial session by giving proper notice of the time when the extra session is to be convened. The very fact, however, that these two questions are raised under the provis ons of our Constitution makes it necessary that the power of decision should be vested somewhere. It is only fair to state that able lawyers divide on both of the questions hereinbefore stated. Who under the Constitution is to place upon this provision a construction that will be conclusive? These are questions that address themselves to a single department of the State government; that is, the executive. The governor, who is elected by the people and who is responsible to them for his acts, and who issues the mandates in calling the legislature together, must necessarily decide what is a proper construction to be applied in the exercise of this extraordinary power. Under the Constitution and laws of our State, there is no other authority to pass upon these questions. When, therefore, the governor, in placing a construction upon this provision says that the Constitution does not mean that an extra session shall be called when the vacancy occurs during a regular session, his decision, under the authority hereinbefore cited, must be conclusive.

The same principle applies in the disposition of the second question. When the executive, in the performance of his duty and the exercise of a reasonable discretion invested in him, decides that he has the right to call an extra session of the legislature at any time between the adjournment of the last legislature and the convening of the next biennial session, by giving proper notice, his decision in this respect must necessarily be conclusive. It may be contended that the construction placed upon the Constitution is not the proper one, but it will be admitted that there must be, in every form of government, some officer or tribunal whose duty it is to finally determine all doubtful questions. In this instance it is plainly the duty of the executive, and he believed that the provision of the Constitution under consideration should receive a reasonable and rational construction.

In the exercise of his discretion he did not feel called upon to convene the legislature in extra session to fill a vacancy at the very time the regular session was balloting day after day for the purpose of electing a United States Senator. In his opinion it seemed like a foolish and futile thing to convene the extra session after the regular session had exhausted all possible efforts to make an election. In this case the regular session continued to ballot for many weeks after the vacancy occurred without producing a result. During the several months the legislature was convened in regular session it became evident that it would be impossible for a majority to agree upon any candidate. If it had been called together in extra session the result would have been the same, and there would have been no election. The vacancy, in all human probability, would have existed after the calling of an extra session, just as it did after the regular session had made every possible effort to elect a Senator. The calling of an extra session would mean the expenditure of several hundred thousand dollars of the public funds; and, with the partisan and factional feeling engendered during the several months of the regular session, no election would have resulted.

Under these circumstances, the executive, in the exercise of his discretion, held that the constitution did not require him to convene the legislature in extra session. The vacancy, however, still continued to exist, and, under the authority of the Federal Constitution, a temporary appointment was made. The executive of the State was the only authority called upon to place a construction upon this constitutional provision, and he has done so, and his decision upon this question, whether it be a correct or an erroneous one, under the authorities is held to be final and not subject to review.

The supreme court of the State of Colorado, in passing upon a question of kindred character, states the rule as follows:

"Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session, under the provisions of section 9, article 4, of the constitution, is a matter resting entirely in the judgment of the executive." (9 Colorado, 642.)

Much has been said upon the precedents of the Senate upon the question of appointments by the executives. The precedents have been conflicting. There have been 138 appointments of Senators by the executives in the history of the Senate. Of these appointments many were unquestioned. On the other hand, in a certain number of cases, objection has been raised to the credentials for various reasons, and the question involved has been passed upon by the Senate. Many of the precedents of the Senate have been admittedly decided strictly upon party lines, and must be considered as partisan decisions. There has recently arisen a determination on the part of some to consider the recent decisions as concluding the Senate from even further debate upon this question and to insist that Senators should vote hereafter according to the precedents in the Mantle and Corbett cases.

When we consider the changing positions which Senators now in this body have occupied in their votes upon these and other cases, and when we recall the narrow and questioned vote by which the Mantle case was decided, and the fact that the Corbett case is hardly recalled as a precedent, owing to certain features therein, it is difficult to imagine that Senators will insist that their votes upon the present case are bound by any doctrine of stare decisis or by any principle of consistency on their part. The well-recognized doctrine of stare decisis, especially as it can apply at all to the Senate, was so ably expounded by the Senator from Wisconsin [Mr. SPOONER] in his speech in the Corbett case, that I shall only refer to it here, and shall content myself with the statement that the Senate is a political body, that it is not bound strictly by precedents, and that, in any event, it can easily be shown that the progressive development of all the precedents of the Senate are in the line of such liberal construction of the Constitution as will recognize the validity of appointments made by a governor when a legislature has had an opportunity to elect.

Unquestionably in the early history of the Government there were precedents in favor of a contracted and illiberal construction of the clause which gives the governor the right to appoint Senators. I have not seen a better or more lucid classification of the character of these narrow constructions, indicating as it does the nature of the much-talked-of Senate precedents, than that made by the Senator from New Hampshire, the chairman of the Committee on Privileges and Elections, in his speech in the Mantle case. He defines the historical development of four limitations attempted to be set up upon the language of the Constitution pertaining to the gubernatorial power to make temporary appointments. The first limitation was that the governor could not appoint to fill a vacancy happening at the beginning of a Senatorial term. The word "happen" was construed to mean a vacancy happening in a term after that very term had once been filled. That was an old and prevalent contention. Secondly, the limitation was contended for that there could be no appointment by a governor in anticipation of a vacancy. In other words, the governor of a State undertaking to exercise the power of appointment must wait until the vacancy actually happened, and no matter how certain the vacancy might be, no matter how sure the governor might be that a vacancy would exist on a particular day, with no possibility of filling it by means of the legislature, nevertheless he could not make the appointment, but must wait until the vacancy actually happened and then make the appointment at the seat of government of his State, and let the place remain vacant until the appointee could reach Washington. Thirdly, the limitation was set up, and it is now under discussion, upon the power of the executive, to the effect that it could not be exerted where the legislature of the State had had an opportunity to fill the vacancy and had failed from any cause to do it. Finally, the fourth limitation has been contended for, necessarily resulting from the third, that after a governor had once made an appointment his appointee could only hold his office until the next meeting of the legislature, and, if the legislature failed to elect, the governor could not make a second appointment. The Senator goes on to say:

These are, I believe, all the limitations which have been put upon the power of gubernatorial appointments at any time during the one hundred years of our governmental history. But they have never prevailed as admitted and undisputed restrictions. They have always been contested, debated, and redebated, and have never become established constitutional or parliamentary law. On the contrary, by advancing toward a broad and liberal construction of the Constitution, we have gone on step by step to enlarge the scope of gubernatorial appointments and to allow such appointments to be made where the advocates of the old doctrine would not agree to tolerate them. In the first place, we have allowed many appointments by governors at the beginning of Senatorial terms. Senators are familiar with the cases. Beginning with the case of Cocke, of Tennessee, in 1797, and coming down to the case of Pasco, in March, 1893, there have been thirteen cases where the governor has appointed a Senator to take his seat at the beginning of a Senatorial term, and in each case the Senator has been admitted to his seat. By these precedents we have utterly destroyed the old notion that a vacancy can not possibly happen in a term unless that very term has once been filled. Secondly, the Senate has come to allow an appointment to be made by a governor in anticipation of a vacancy. The incubus which prevented a governor from making an appointment until a vacancy actually happened, however sure he might be that it

would take place, was not finally removed until the Fifty-second Congress, in 1891, when in the case of Senator Chilton, of Texas, it was deliberately determined by a unanimous report from the Committee on Privileges and Elections, adopted by the Senate, that the old notion should be exploded, and that a governor, if he knew that a vacancy was to take place, and that no legislature could fill it, might make his appointment before the vacancy took place, and that the Senator might come here and hold his seat under such appointment. Thirdly, the Senate has made this further advance, in the three New Hampshire cases, and in the case of Senator Pasco, of Florida, sitting under a gubernatorial appointment, that it has consented to seat in this body a Senator appointed by a governor where there is a doubt as to whether a legislature meeting next previously to the vacancy should have chosen or should not have chosen the Senator. The fact that although a legislature may have met which was entitled to fill a Senatorial vacancy, and failed to fill it, yet there was a doubt about the right of that legislature to fill it, has been accepted as a justification of a gubernatorial appointment. So we have made three new gains from the old prohibitory notions, and we are now confronted with the question of whether, fourthly, a governor may not appoint, although a legislature which had the undoubted right to fill a vacancy has met and failed to fill it; and, fifthly, whether or not as the result of an affirmative decision upon this point, a governor may not continue to appoint as often as a legislature shall make the attempt but shall not succeed in choosing a Senator and placing him within the Senate Chamber. Having carefully considered the question whether or not this new advance should be made through a liberal construction of the clause in the Constitution giving the governors the right to make appointments, I have no hesitation, now that I am confronted with the question, in reaching the conclusion that the gubernatorial power of appointment does exist in these two remaining cases, and that Senators appointed by governors under such circumstances are entitled to admission and to their seats in the Senate.

In other words, the progress made in the precedents of the Senate has been one of steady advance. It has been a contest against a spirit of narrowness and technicality. As I stated in the beginning of my remarks, the interpretation of every word in the provisions of the Constitution concerning Senators has exhibited a progressive tendency toward liberality, in order that the evident purpose of the Constitution might be carried out, that the Senate should be kept filled. The present contention that a governor can not appoint where a legislature has had an opportunity to elect, or after having once appointed, that power is exhausted, are two of the last places left for those who by a curious persistency would desire to hamper the full representation of States in this Senate. I have no doubt, whether it shall be realized in this case, or some other, that the ultimate decision of this body will be to complete this progressive constitutional interpretation, and will recognize the intention of the Constitution to create a Senate and as a consequence to have that Senate filled; and to have that Senate filled by elections by legislatures for full terms, or remainder of terms, and by temporary appointments by governors where there are vacancies existing in the recess of the legislature.

The power of temporary appointment by the governor is as little capable of exhaustion as is the power of election on the part of the legislature. The legislature can elect as often as necessary, whenever it is able to do so. If the legislature elects a Senator, and he dies during their session, it is clear that it is their duty to elect another Senator, and so on still a third, if occasion arose during their session. No one pretends that the power of election is exhausted, and it is difficult to see how by any subtlety of reasoning it can be established that the power of the governor to make temporary appointments, a power of equal authority and validity in its sphere, can be exhausted either. The governor can appoint as often as vacancies exist, just as the President can fill vacancies in the offices of the Government. There are two salient ideas which seem to be uppermost in the minds of those who would take the narrow and technical view in opposition to the right of the governor to fill vacancies. The first idea is that in some way the legislature is nearer to the people than is the governor; that in some way a commission derived from the legislature is of higher authority and validity than that derived from the governor.

I have already shown that this contention might have some weight if the commissions were of similar character, but there seems to be a tendency to forgetfulness or to obscurity regarding the distinction already referred to between the election by the legislature for the full term, or the balance of the term, and the temporary appointment by the governor until the legislature meets. The second idea that seems to be uppermost is that some kind of a penalty should be inflicted upon a State on account of the failure of the legislature to elect a Senator. It is incredible that anyone can seriously believe, upon deliberate thought, that the Constitution intended to inflict a penalty upon the people of a State for the inability, negligence, or delinquency of their officials. Not alone is this penalty inflicted upon the State concerned, but upon the people of the whole United States, who, as already shown, are as deeply interested in having this body filled as are the people of the particular State. It would rather be supposed that it would be the intention of the Constitution, or of any sensible plan of government, in fact, to relieve and protect the people of the State from such inefficiency on the part of public officials. If a governor is found corrupt in office, and great damage results to the community, is it contemplated that the people should suffer a penalty for the delinquency of their chief official? On the contrary, impeachment proceedings are provided for to effect their future protection. Likewise with the election of Senators, if the legislature is unable to elect, the Constitution provides ample remedy by the appointment by the governor to fill the vacancy.

While it is argued that when a term is vacated by its expiration the event is certain and does not partake of the character of those causes included in the arbitrary classification of death, resignation, or otherwise, and that it is not unexpected and fortuitous in its nature, yet the facts in many cases prove an entirely different condition of affairs. The failure of a legislature to elect, as has been proven in many cases, may be unexpected a few weeks or even a few days before the meeting of the legislature, and even further than this, the legislature may have an earnest purpose to bring about an election, and yet be utterly unable to do so by reason of three parties existing in the legislature, each firmly believing in its own principles, and very properly and fairly so, and each, with equal propriety, being unwilling to surrender them. Therefore, under the provisions of the act of 1866, requiring a majority of all the members of a legislature to elect, it is obviously impossible, and not to be expected, that an election can be made by the legislature. Daily balloting are taken until the adjournment of the legislature sine die; thus a vacancy, unexpected and fortuitous, has occurred.

By the failure of the legislature to elect a Senator the State is not only deprived of its equal representation, but the will of the majority of the people is frequently completely frustrated. In Pennsylvania it is interesting to observe that the people of the State have sustained with increasing majorities the regular organization of the Republican party, which was represented in the last legislature by the Republican caucus which unanimously nominated Mr. Quay for the Senate. In 1897 the Republican candidate for State treasurer, after a campaign in which the administration of the State treasury had been directly and vigorously attacked, received 372,448 votes, and the Democratic candidate 242,731, making the Republican candidate's plurality 129,717. The vote for the Democratic candidate and all other candidates for State treasurer opposed to the Republican candidate was 412,517, making a popular majority over the Republican candidate of 49,029. It will be observed that in this election of 1897, while the Republican candidate polled an enormous plurality, he failed to poll a majority of all the votes cast.

In the following election in November, 1898, the Republican candidate for governor received 476,206 votes; the Democratic candidate, 358,300 votes, giving the Republican candidate a plurality of 117,906 votes. The vote for the Democratic candidate and all other candidates opposed to the Republican candidate for governor was 495,509 votes, making the popular majority against the Republican candidate, notwithstanding his enormous plurality, 19,303 votes. While the leading candidate failed to poll a majority of the whole vote, the majority against him of all candidates was actually 30,000 votes less than that for State treasurer in the preceding campaign. In the election of 1899 a State treasurer was elected. The Republican candidate ran upon a platform which contained an emphatic indorsement of Mr. Quay and declared that—

our State is entitled to full representation in the United States Senate, and we indorse the action of the governor in making his appointment to fill a vacancy caused by the failure of the last legislature to elect.

Upon the question of the adoption of the platform in the State convention, containing this emphatic indorsement, the vote had been 192 to 49, indicating a practical unanimity in the convention. The campaign involved the attacks upon the management of affairs by the Republican party, which had been vigorously made in the two preceding campaigns, and, in addition, the issue was squarely fought out upon this plank in the platform as to the indorsement of Mr. Quay. The vote for the Republican candidate for State treasurer, elected in November, 1899, was 438,000 votes. The vote for the Democratic candidate was 327,512 votes, making the Republican candidate's plurality 110,488 votes. The vote for the Democratic candidate and all other candidates opposed to the Republican candidate was 352,488; thus giving the Republican candidate an actual majority of all the votes cast of 85,512 votes.

I called attention above to the fact that in the two preceding campaigns, with the enormous pluralities, the candidates of the Republican party failed to poll an actual majority. I called attention to the fact that while the State treasurer in 1897 had a popular majority against him of over 49,000 votes, that this majority was cut down 30,000 at the ensuing election for governor. Now, with the issue fairly made upon a candidate for State treasurer, with the added issue made the leading feature of the campaign upon Mr. Quay and the plank in the platform of the Republican party indorsing his appointment, in an off year, with every opportunity for party dissatisfaction and reaction, after three years of agitation and unlimited opportunities for publicity, the final result has been the polling of an enormous actual majority for the Republican party and an indorsement of the Republican platform, with this plank indorsing the appointment by the governor. One of the most striking features of the results in the last election for State treasurer, following upon the adjournment of the legislature, is the fact that in the counties of Pennsylvania from which

had come the bolting Republicans the candidate for State treasurer received enormous gains. I refer to these facts to illustrate the statement that the governor of Pennsylvania in making this appointment, having a due regard for his individual responsibility to the people of the State, has been sustained by them, and that in sending these credentials to the Senate it can be fairly claimed that he acts in accord with the sentiment of the great majority of the people of Pennsylvania.

The purpose of the Constitution of the United States to provide in certain instances secondary methods of filling an office is well illustrated by the provision made in article 12 of the Constitution, known as the twelfth amendment, relative to the election of President, which, after declaring the way in which electors shall meet and ballot, reads as follows:

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote: a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice.

The Constitution in this instance even goes further and provides still a third method of filling the office of President in case of the failure of the House of Representatives to elect, by providing

> And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President in the case of the death or other constitutional disability of the President.

In the same way, with reference to the Vice-President, it is provided

> The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President.

Twice in the history of the country has the electoral college failed to make an election, and the House of Representatives has been called upon to elect. This failure occurred when Jefferson was elected and when the second Adams was elected. No one has ever attempted to maintain that the people of the United States should suffer by having the office of President vacant by reason of any supposed delinquency on the part of the Presidential electors in not being able to elect a President. No one has ever challenged the full authority of the House of Representatives to make an election after such failure. The case is precisely the same with the failure of a legislature to elect a Senator. The Constitution has provided two methods of equal authority under which the Senatorial office can under nearly every circumstance be kept filled.

The proposition that the Constitution provides for the election of Senators for a term or for the remainder of a term and for the temporary appointment of Senators in case of vacancies until the legislature meets and elects is simple and direct. On the other hand, any proposition which involves any limitations arbitrarily set up, based upon refinement and technicality, upon the right of the executive to appoint, involves the question in confusion and obscurity. More than this, it has been the chief reason why so many of these cases are valueless as precedents, because they have been open to the charge of having been decided upon partisan or factional lines. The moment we attempt to define and to restrict and to limit the executive power of temporary appointment to fill vacancies we open the door for discrimination and distinction in each particular case. These cases of executive appointment will never be settled in this Senate until they are settled upon the plain, common-sense principle of recognizing the right of the State to be represented, the paramount purpose of the Constitution to keep the Senate full, and the power of the legislature and the governor, in their respective spheres, to contribute to that end. Until that is done these cases will always be involved in partisan and personal considerations. They will be acted upon from very much the same party and personal motives as exist in the decision of a contested-election case in the House of Representatives, or formerly in the English Parliament, before the abuses became so great that the high prerogative of judging of the qualifications of its own members was taken away from Parliament and referred to the courts. That the plain and simple proposition now contended for will be the ultimate decision and practice of this Senate I have no doubt whatever.

Mr. McCUMBER. Mr. President, there are three fundamental rules applicable to the construction of an instrument, rules grounded on the clearest reasons and acknowledged as elementary.

Their relative importance is in the order in which I state them:

First. If the paragraph or section, giving the words their usual and natural meaning, clearly indicate the purpose, that purpose must be adopted.

Second. If the meaning is not clear from the words used, giving them their natural significance, then the section should be considered in connection with other sections of the same instrument bearing upon the same subject.

Third. If the application of both of these rules fail to elucidate its object or intent, then and then only recourse may be had to the debates, discussions, and other surrounding extraneous conditions.

Strange as it may seem, Mr. President, this last rule, acknowledged alike in reason and in elementary law works to be the weakest, the most unsatisfactory, and its use justified only when the others absolutely fail, has been given more prominence, more elucidation, more time than either or both of the more important rules.

I know the application of this latter rule; the weaker is naturally the most popular. It is so easy to conjecture the innumerable things that might have been contemplated by the authors of any written instrument, because when you enter that realm of metaphysics your way is impeded by no barrier; the boundless expanse of infinity is before you; you can embellish your arguments with a boundless variety of conjectures limited only by the finite power of an elastic imagination. I am nevertheless not prepared to adopt the view of those Senators who go to the other extreme and assert that the section is so plain, so clear, that it requires none of the rules of construction to ascertain its true purpose.

The very construction which these same reasoners place upon the word "otherwise" annihilates their claim, for that word in its usual sense is nearly the equivalent of the two words "other ways," which will include any other way, while they insist its meaning should be restricted to cases of like character to the word "resignation."

Mr. President, the section is ambiguous, as is clearly evidenced by the diverse conclusions of so many eminent attorneys. I wish therefore to approach this question not as an attorney desiring to impress upon a court a construction in harmony with a preconceived desire, but with unbiased wish only to fathom the real intent of the framers.

The whole question depends upon the meaning of but two words—"*otherwise*" and "*happen*." Giving both their broadest use, we may be able to support the claim of Senator Quay to a seat. Giving to "*happen*" its natural meaning or to the word "*otherwise*" its restricted sense, either the one or both, defeats this claim.

I desire in the few remarks I shall make upon the matter under discussion to avoid as much as possible traversing grounds already amply discussed by various members of this body. I have listened with great interest to and have derived much instruction from those learned debates, which have so fully presented all the conceivable benefits desirable from adopting one construction and all the conceivable injuries and disasters from following the other.

The great bulk of all the discussions has been directed toward the presentation of those extraneous reasons for adopting this or that construction.

These facts and conditions have been so fully presented that it seems to me unnecessary to prolong the discussion upon that important element which does and should have its proper weight in arriving at a just interpretation, and justifies me in confining my remarks to an analysis of the section itself, believing that it inherently furnishes sufficient material for its own construction—the scales to weigh its meaning, the standard to measure its length and breadth—the scope of its application.

As we arrive at the genus or species of a plant by careful and distinct separation of calyx and corolla, of sepals, petals, stamens, and pistil, so may we generally arrive at the true though somewhat obscured meaning of any paragraph or section which has been built up from any general first impression or idea by successive additions or modifications by going back to that first idea or impression and then considering separately each modification or addition and its object, for what purpose, and to what extent it was intended to modify.

Mr. President, the provision in the Constitution before us for construction is one relating to the power of the executive of a State to make an appointment for the purpose of filling a vacancy in the United States Senate caused by the expiration of a term of office of a Senator and where an intervening legislature of a State from which the appointment is made has failed to elect.

This provision is as follows:

> *And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.*

My first impression was, on reading this section as applied to the case under consideration, and without an examination into its history and the conditions and arguments concerning its adoption, that the word "*happen*" was equivalent to the word "*occur*," and that the word "*otherwise*" included all possible causes of vacancy. A closer analysis of the section itself, and especially of its development in the Constitutional Convention,

and the causes and reasons governing its changes, have led me to change the views which I first entertained.

I desire now to explain my present views and the reasons for my conclusions.

Like the interpretation of any legal instrument, the rule of construction should be to give effect, as far as possible, to the intent of the framers of this instrument. To do this it is as necessary to consider the section in connection with others bearing upon the same subject-matter and quite proper that we should consider the debates, discussions, and surrounding circumstances which influenced the adoption of the particular section under consideration.

It had already been determined by the Constitutional Convention that the Senate should be composed of two Senators from each State, chosen by the legislature thereof. It was, therefore, clearly the intent of this Convention that the primary power for the election of Senators was intended to vest solely in the legislature. The power to elect Senators was granted to the legislature of the States, and the power to elect Representatives was granted to the people.

It must be remembered that in this Convention the rights of the individual States were jealously guarded by the members representing them.

It was carefully planned that the identity of the State should not be lost and that the influence of the smaller State was not to be overshadowed by a more powerful sister State, and so it was provided that each State should have two Senators, with equal voice and power, representing not so much the people as the sovereign State itself, and who were to be elected not by the people, but by the State acting in its corporate capacity by its duly constituted officers—the members of the legislature. On this point the intent of the framers of the Constitution is clear.

But the legislature of the State not being a continuous body, the question of probable vacancies arose, and the section pertaining to these vacancies had a very decided and progressive growth (as was very natural) from a rather *extended, homogeneous*, and *indefinite* condition to a *limited* and *definite* state.

The committee on detail had brought before the body this provision: "*Vacancies may be supplied by the executive until the next meeting of the legislature.*" Now, do Senators stop to consider that these few terse words contain everything that is claimed by the supporters of the power of the governor to appoint in the case at bar? Every proposition that has been made by those in support of seating Mr. Quay could have been covered and clearly covered by this clear statement as it first appeared before the committee.

If the members of that Convention had in view or in contemplation the failure of the legislature to elect, and desired to give authority to the governor to fill such vacancies and all other vacancies, I know of no words which could more tersely and briefly and yet fully grant that power than this single sentence: "Vacancies may be supplied by the executive until the next meeting of the legislature."

Under that section, as reported by the committee on detail, as often as a legislature adjourned without election the vacancies caused thereby, over and over again, could be filled by appointment.

And if it was intended that the executive might make temporary appointment to fill *any* vacancy which occurred until the next meeting of the legislature, why was not this report of the committee on detail adopted?

It certainly was concise enough, couched in clear language, and yet broad enough to cover every claim, and so simple that he who runs may read and understand.

So far in the development of the law pertaining to election of Senators but two propositions appear. I am following this chronologically as it was adopted. First, that the primary power to elect is in the legislature; second, that the vacancies supplied by the executive could only last until the next meeting of the legislature. It will be noted that these two propositions have never been eliminated, but stand as the two leading features unchanged and unassailed throughout the developing process of the law and the section itself. Now, we must admit and concede that every change made in that section, after it was first reported, by the addition of words or phrases was for a *specific* purpose. We must further concede that as the section when first reported was as broad as it could possibly be made, the added words and phrases were all *limitations* and not *extensions*.

You can not extend a sentence or a section which is as broad as it could be possibly made and so full that it contains everything that you can possibly claim for it. It is equally clear, as shown by the evolution of this section in its embryonic development and the debates by the framers thereof, that they contemplated vacancies by *resignation*, because that word appeared in the development of the section itself; that they contemplated vacancies happening by *refusal to accept*, because that appeared in the development of the section; that they contemplated a vacancy by *death*, because that appeared in the plan of government as drafted by Mr. Pinckney and used as a basis for the Constitution which they were framing.

Right here I desire to call Senators' attention to the fact that these particular words, all of which they contemplated, were, every one of them, words or phrases of casualty or chance, and that "happen" was used only in connection with those words, and "otherwise," when part of them were eliminated, was supplied to take the place of those which were eliminated.

They had in contemplation vacancies caused by *removal*, because that feature was, as I now remember, debated. When the committee on detail reported this simple power, "*Vacancies may be supplied by the executive until the next meeting of the legislature*," the Convention immediately modified it by detailing what vacancies, and they added after the word "vacancies" the words "*happening by refusal to accept, resignation, or otherwise.*"

I wish to call your attention to the fact that the word "happen" appears for the first time in connection with those words of casualty, those words of chance, and the section was complete without the other phrase "during the recess of the legislature" and did not appear at all when the word "happening" was first used in connection with these other words. So that it read, instead of the simple words "vacancies may be supplied," etc., "vacancies happening by refusal to accept, resignation, or otherwise may be supplied," etc.

Now, can any Senator say that with these added words it means just the same as it did? If he so claims, what reason on earth can he give for adding those words?

There is the question for us to consider. Did it mean after you had added those words just the same as it did before? If he so claims, what reason on earth can he give for adding those words? What actuated the Convention in making these additions, if it was not intended to modify the original? They did so amend it, and certainly must have intended to modify its original meaning. As amended it was sent to the committee on style, and this committee not only changed the phraseology, but they added the phrase, "*during the recess of the legislature*," thus further modifying the character of vacancies to those which should happen between the sessions of the legislature, and they further modified, so as to make the restriction more definite and clear, "that the executive may make *temporary* appointments until the next meeting of the legislature." Every step they have taken, every modification, has been toward restriction and not toward extension.

It comes back again in this modified form, which reads as follows:

> And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature.

But the Convention, still further desiring to restrict the term of an appointee made by the executive, or at least to make certain that such appointment should not run beyond the time in which the *primary power*, the legislature, could meet again, took up the modified section and added, after the last word, "legislature," the words "*which shall then fill such vacancies.*" The word "*shall*," and not "*may*," is used. thus showing the intent to impress the power as a *duty* which the legislature should perform at its earliest opportunity. Now, keeping in view that the primary power granted to the governor was to make temporary appointments to fill a vacancy until the legislature could act and not to supply the *omission* of the legislature, we find that in this process of developing the section some of the words became aborted because their function was performed by another word.

By these words I refer to everything that was considered either in the section or in the debates, namely, "*death, resignation, failure to qualify*, and *expulsion*," and the place of all was supplied by the word "otherwise." But as it was necessary that one of the words, expressing the cause of the condition, which, while unlike, produced like effect, a vacancy should be expressed, the word "resignation" was retained as an antecedent, and the word "otherwise" substituted for the other words and phrases. *What other* words and phrases? Why, the others which had at one time been either in the section itself or in the minds of the framers, as expressed in their debates. I desire to show by this that the word "otherwise" was used to take the place of those particular words which were considered.

It seems to me in the debates on this floor which I have listened to that each side of this controversy, impelled by a desire to outdo the other in lauding the framers of this Constitution, have sought to accord to them minds of infinite wisdom, incapable of making an error, or of not foreseeing every contingency that might arise. Such extravagant assumption, I think, rather hinders than assists us in arriving at any proper conclusion as to their real intent.

This scheme of government was modeled after the British Parliament, and especially that portion relating to the Senate was novel, and it is not astonishing in the least that these men, no matter how thoughtful, no matter how brilliant, might not have foreseen and contemplated those desperate political conflicts, waged with such earnestness and determination of purpose as to

defeat rather than accomplish an election. It is very certain that nowhere in the debates can be found anything indicating that a single member ever contemplated such condition. It is equally certain that men of their intellectual power, had they foreseen or contemplated this condition, would have made some expression about it, in some manner, and I believe would have provided with direct reference to it.

The only reasonable conclusion, therefore, which we can arrive at is that the Constitutional Convention did not contemplate this contingency. This seems to me to be so clear and so certain that controversy can hardly arise upon it, and I feel that it is a waste of time to attempt to arrive at what was their intent in reference to the condition where the legislature should fail to elect, when, as a matter of fact, we can see that they had no intent concerning it. But they did have in mind all of these other conditions or causes which might create a vacancy, and the word "otherwise" must therefore be reasonably construed to include *what they did have in mind*, and not *what they never considered*. And if it be admitted that the word "happen" was used by them in its restricted sense, "to come by chance," "to come without previous expectation," then a priori would the word "otherwise" be limited to include only the words and phrases mentioned, because the expiration of a fixed official term can not come within the category of chances.

Had this section appeared in the first instance in its entirety as we now find it in the Constitution, it might then be reasonably claimed that it should be given its broadest meaning, as including in itself any other cause of vacancies, and not simply a cause of like character. The section only selects from the list of the words discussed the word "resignation;" still we must all admit that the word "otherwise" will include death, because we say it is of like character; but there is no closer relation or likeness between death and resignation than there is between resignation and failure to elect. Likeness in words or phrases must be determined by their like impressions, and, as used, these words mentioned have in their effect the same result, namely, vacancies, and if my reasoning took me by that route I would be forced to give the word its broadest scope. My reason for arriving at the conclusion that it should be considered as including only the other words is that it is evident that the purpose of the committee on style and the Convention itself in making these additions was not to enlarge the scope of the authority to appoint, because it was incapable of greater enlargement, being absolute as it stood, but to restrict, and for the further reason which I have stated, that it never occurred to them that the members of the legislature, by reason of intense political strife, would fail to perform its function of electing a United States Senator.

I come now to the question of the construction of the word "*happen.*" I have already given the general definition of the word "happen"—to come by chance, without previous expectation. The element of *chance* is generally considered wherever it is properly used. I wish to get at the intent of the members of the Constitutional Convention as evidenced solely by the first idea impressed in printed matter and as then developed. The committee on detail brought in this phrase, "*vacancies may be supplied by the executive until the next meeting of the legislature.*" It will now be observed that neither the word "happen," nor the words "by resignation or otherwise," nor the words "during the recess of the legislature," appear in this phrase. It was complete without them. Without any one of the qualifying words, the phrase was complete, and gave full authority to fill any vacancies *occurring* at any time, and which would hold good until the close of the following session of the legislature, when the executive could again, upon a second failure to elect, appoint, because there would be a vacancy, the word "happen" not appearing in the section as first reported by the committee on detail. It is not "all vacancies which may happen may be supplied by the executive," but it simply reads, "vacancies may be supplied by the executive."

In other words, when the section came before the Convention, with full power to make appointments whenever a vacancy occurred, the word "happen" is not found; we only find it used in connection with those other words or phrases, every one of which indicates coming by chance, namely, "*death, resignation, failure to qualify, expulsion*," things which were not to be contemplated as following by previous expectation at a definite time in the course of events; and when they *did commence* to use these words in the building up or development of this section, they used in connection therewith this harmonious word "*happen*," showing clearly that they used it in the sense of coming by chance, and not as claimed by many Senators, by a known expiration of an official term. Vacancies happening by *refusal to accept, by resignation, by death*, these are causes which *happen*, and not causes which are contemplated as *occurring* definitely upon a future day, and for the first time, with these in view and expressed, they used the word "happen" as applied to those conditions, none of which could be foreseen.

These words were put there for a purpose, so as to give the section a different meaning. Why should they have had extra words of limitation, such as "happening during the recess of the legislature," if they did not intend such words should limit, or why have these extra words or phrases if not intended to change the original meaning of the section, remembering that the power claimed is fully granted without them?

There is another reason which, independent of present views of what is the proper construction, ought to have great weight. Why should not the rule of stare decisis be invoked in this case? It not only affects property rights of the individual, but also affects great political questions, affects the foundation of our system of elections of members of this body; and when you once assail and weaken a portion of this structure you invite further modifications, threatening the very structure itself.

I desired, in the few brief sentences I have expressed, to confine myself solely to the one condition of exemplification of this section itself, because I have felt that it had already been fully and fairly considered and discussed, so far as extraneous conditions should be considered in determining its construction. I desire to say that I feel more firmly that I stand upon the right reason, and that my conviction is well founded, when I know that it is against the emotion, and is simply the result of my reasoning powers applied to the section itself. I can not follow the first impression that I had with reference to this matter without having my vote entirely out of harmony with my conscience and out of harmony with my reason.

Mr. LINDSAY. Mr. President, the fifth section of Article I of the Constitution provides:

> Each House shall be the judge of the elections, returns, and qualifications of its own members.

Therefore, when a question of the election of a member of the Senate arises, the facts being presented to the Senate, the questions of law, constitutional and statutory, being considered, the final action of the Senate is in the nature of a judgment as contradistinguished from a mere legislative enactment or proceeding. I understand such to be the view of the Committee on Privileges and Elections. In the Du Pont case it was said:

> The simple question is: Whether the Senate, notwithstanding its decision of May 15, 1896, will now admit Mr. Du Pont to a seat?
>
> The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution the judge of the elections, qualifications, and returns of its members, and its judgment is just as binding in law, in all constitutional vigor and potency, when it is rendered by one majority as when it is unanimous.

Again the committee say:

> It is clear that the word "judge" in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its members or by their opinions as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice. We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals.

If such a decision be in the nature of a judgment in the sense in which that word is used by judicial tribunals, then it follows that each finding is in the nature of a binding precedent upon the body that, sitting for the time being as a judicial tribunal, renders the judgment. It is not a judgment that may not be overruled in a succeeding case if the body that rendered the judgment changes its opinion as to its propriety; but it does constitute a precedent which, until deliberately overruled, binds the judicial tribunal that rendered it. It binds all the people of the country affected by it until there shall be a new hearing and a second consideration, upon which the judicial tribunal shall find itself willing to declare that its original judgment was erroneous, and that it must be reversed in the interest of right and justice.

The Senator from Massachusetts [Mr. HOAR] did not exactly meet the point made by the Senator from Connecticut [Mr. PLATT] on yesterday when he undertook to treat the judgment in the case of Du Pont, as though it had been attacked in a collateral proceeding. The application and motion of Mr. Du Pont was in no sense a collateral attack upon the judgment. Du Pont came here and asked that the judgment be reopened. His motion was in the nature of an application for a rehearing. The proceeding was direct. The application was directed to the body having complete control over the subject-matter of the judgment. No condition had changed, no new right had intervened, no statute of limitation, no fixed rule of the Senate cut off the application. Therefore, it was a direct proceeding timely instituted to have a rehearing of a question over which the Senate had complete jurisdiction.

The response made by the Committee on Privileges and Elections was that the Senate sat as a court; that it undertook to judge, and did judge, great questions involving the right of the applicant, and the right of the State of Delaware, and the right of all the other States; and that upon deliberate consideration that great constitutional question had been settled, and conclusively settled. The Senate had jurisdiction to open the case, and

had the right to go back and retry all those questions, and if the Committee on Privileges and Elections were of opinion that it was a precedent which did not bind in a new case, it was certainly a precedent that did not bind in the identical case in which it was made on a proper application for a rehearing by the body having complete jurisdiction, and not cut from the rehearing by a statute of limitation or by a fixed rule of Senatorial procedure.

The Corbett case followed in the wake of the Lee Mantle case. The facts, though dissimilar in many respects, did not change the principle applicable to the Lee Mantle case; yet the Senate acting upon the assumption, and the correct assumption, that the Lee Mantle decision constituted a precedent that bound the Senate, that bound all the people of the United States, that bound all the governors of the States, rejected the application of Corbett for a seat in the Senate. It rejected that application by a majority absolutely overwhelming, and yet we are told on the floor of the Senate that although the question presented by the report of the committee involved questions of constitutional law alone, that Senators were not controlled in their votes either by their convictions of what the true constitutional principle was or by the binding obligation of the precedents that had been set by the Senate, but that outside of the case, independent of the questions on which the Senate was called on to act, there were certain notorious facts, facts known in some way to Senators, which so far affected the moral standing of the applicant that their votes can be defended upon the idea that in disregarding the constitutional rule and the binding precedents they acted on the moral conviction that Corbett ought not to be seated, even though in every respect his appointment was regular and constitutional.

Now, then, there is another case, and except for the fact that that case had *happened* I should have contented myself with a silent vote to-day. The legislature of Kentucky at its session of 1895–96 was charged with the duty of electing a successor to the Hon. J. C. S. Blackburn, whose term of service expired on the 3d day of March, 1897. The legislature failed to make an election, and at the expiration of the constitutional period of its existence adjourned sine die, no election having been made. Mr. Blackburn served until the 3d of March, 1897. At that time the legislature of Kentucky was not in session. The governor of the State appointed the Hon. Andrew T. Wood to serve in the Senate until the legislature should elect some one to fill the vacancy created by the failure of the preceding legislature to elect. Mr. Wood appeared in the Senate with the letter of appointment by the governor of Kentucky on the 10th of March, 1897. Mr. HOAR moved that the oath be administered. Whereupon Mr. Gorman moved that his certificate of appointment, with the motion of Mr. HOAR, be referred to the Committee on Privileges and Elections. That motion was carried.

The credentials went into the hands of the Committee on Privileges and Elections. The Senator from Massachusetts [Mr. HOAR] was then, as now, a member of that committee. The Senator from New Hampshire [Mr. CHANDLER] was then, as now, the chairman of that committee. If their present contention be correct, Wood was lawfully appointed to serve as Senator until the vacancy should be filled by an election by the legislature. There has never to this day been a report from the Committee on Privileges and Elections in regard to Wood's title under the appointment by the governor of Kentucky.

The motion and the credentials remained in the hands of the committee until the legislature was subsequently convened in extraordinary session by the governor, and the junior Senator from Kentucky [Mr. DEBOE] was elected. In May, 1897, more than two months after this motion to qualify Wood had been made, Mr. DEBOE appeared in the Senate and took the oath as Senator.

Now, I wish to know from the Committee on Privileges and Elections why it is that an appointment made by the governor of Pennsylvania at a time when the legislature was not in session, to fill a vacancy that happened while it was in session, is entitled to consideration at their hands, while the appointment made by the governor of Kentucky to fill a vacancy that did not happen at the time the legislature was in session, but during a recess, was permitted to sleep the sleep of death?

If Mr. Quay is entitled to be admitted as a Senator to-day, Mr. Wood was entitled then to be admitted as a Senator. Yet not only he was not permitted to be sworn in, but the Committee on Privileges and Elections pocketed his credentials, pocketed the motion to qualify him as Senator from the State of Kentucky, and he has never yet had the gratification of having an expression of opinion even from the Senator from New Hampshire and the Senator from Massachusetts that he was legally appointed to sit as a member of this body.

As to Wood, the Lee Mantle precedent was binding and conclusive. As to Mr. Quay, the Lee Mantle decision and the Corbett decision and the nonaction in the case of Wood are to go for naught.

The Commonwealth of Kentucky is entitled to some explanation at the hands of the Committee on Privileges and Elections as to why it is that a distinction like this is made between appointments coming from the governor of Pennsylvania and appointments coming from the governor of Kentucky.

If the precedents established before the application of Wood and the precedents antedating the application of Corbett bound the Senate, bound the State of Oregon and its governor, and were conclusive on the State of Kentucky and its governor, I ask if any peculiar reasons have been or can be given why those precedents do not also bind the governor of and the State of Pennsylvania?

I do not call in question the power of the Senate to overrule any decision it may have given on any question, but I do insist that the difference in the individuals, the difference in the political complexion of the Senate, the difference in the results to be brought about, the difference in the collateral importance of seating one man over seating another, are not legitimate considerations when we are called on to overrule and set aside precedents that have been solemnly established and to establish new precedents that are to operate in the future until the political complexion of the Senate shall change or until some ulterior purpose is to be attained of so much importance that the new precedents must be disregarded as the old precedents have been set aside.

It is seriously contended that vacancies in Senatorial terms are to be treated as vacancies in executive, ministerial, and judicial offices, and that the rule of interpretation applied to the power of the President to fill up vacancies is to be applied to the power of the governors of the States, not to fill vacancies, but to make appointments, temporary in their character, and that the rule in the one case ought to govern the other.

Now, let us see about that. Certain classes of Federal officers can only be appointed by the President. They can not be elected. The Constitution provides that certain appointments shall be made by the President subject only to the advice and consent of the Senate. The Constitution provides that as to those offices, in cases of vacancies, the President shall fill up the vacancy, not make a mere ad interim appointment. He has power to fill up the vacancy, the appointee to serve until the close of the next session of the Senate. So, then, when the President appoints a judge, when he appoints a district attorney, when he appoints a commissioner of internal revenue or a collector of internal revenue, he performs an executive function, a function with which he is clothed by the very letter of the Constitution. When a vacancy happens in one of these offices, he fills the vacancy in the due exercise of executive function pure and simple, a function conferred by the express language of the Constitution.

It is not so with the appointment of a Senator to a seat in the Senate of the United States. The appointment of a legislator is not executive. The whole theory of our governments, State and Federal, is that the legislative and the executive functions shall be committed to distinct and separate bodies of magistracy; that the legislatures shall not elect the President or the governors, and that the governors or the President shall not appoint the legislatures, but that these two great departments shall at all times be kept separate and distinct, so that when the governor of a State comes to appoint a member of the highest branch of the Federal Congress he exercises a function that is in no sense executive in its character, according to American understanding. He makes the appointment in virtue of an express constitutional provision, applying only to an exceptional case; and while the power of the President is to be liberally construed, the power of a governor of a State to control by his appointments the composition of the Federal Senate is to be strictly construed, and he who comes here with an appointment from a governor and claims the right to a seat comes with the burden of showing that the exact condition existed at the time the appointment was made that the Constitution provides for.

Keeping these distinctions in mind, it will be seen at once that there may be a rule of interpretation applied to the power of the President to fill vacancies that is utterly inapplicable to the power of the governors of the States to fill up the highest branch of the Federal Legislature with their appointees. Primarily, Senators must be elected, not appointed; they must be elected by the legislatures of their States, not elected or appointed by the governors of their States.

One of the greatest contests in the Convention that framed the Constitution was as to the character of representation to be had in the Senate. The Virginia plan was to make both the Senate and the House representatives of the people as contradistinguished from the States. Members of the House of Representatives were to be chosen by the people; members of the Senate to be chosen by the legislatures of the States, but the proportion of representation was to be determined by the population of the respective States.

Under that plan Virginia would have had six or eight times as many Senators as Vermont. New York and Pennsylvania would have had two or three times as many Senators as Connecticut. The controversy between the smaller States and the greater States reached a point at which the Convention came within one step of

dissolving, because the smaller States would not consent to give up their equal representation in one branch of the National Congress, and the larger States would not concede it. Recognizing the fact that the Convention was about to prove a failure, what came about? Did the majority establish the Senate with the view of keeping it full at all times, or did the Convention establish the Senate and provide that each State should have equal representation by way of concession to the smaller States, without which the whole plan of Federal Government would have failed?

I take the liberty in this connection to read from Curtis's History of the Constitution:

The basis of the House of Representatives having been thus agreed to—

That is, the question of how the slaves should be counted as against free voters—

the remaining part of the report, which involved the basis of the Senate, was then taken up for consideration. Wilson, King, Madison, and Randolph still opposed the equality of votes in the Senate, upon the ground that the Government was to act upon the people and not upon the States, and therefore the people, not the States, should be represented in every branch of it. But the whole plan of representation embraced in the amended report, including the equality of votes in the Senate, was adopted by a bare majority, however, of the States present.

When this result was announced, Governor Randolph complained of its embarrassing effect on that part of the plan of a constitution which concerned the powers to be vested in the General Government; all of which, he said, were predicated upon the idea of a proportionate representation of the States in both branches of the legislature. He desired an opportunity to modify the plan, by providing for certain cases to which the equality of votes should be confined; and in order to enable both parties to consult informally upon some expedient that would bring about unanimity, he proposed an adjournment. On the following morning, we are told by Mr. Madison, the members opposed to an equality of votes in the Senate became convinced of the impolicy of risking an agreement of the States upon any plan of government by an inflexible opposition to this feature of the scheme proposed, and it was tacitly allowed to stand.

Great praise is due to the moderation of those who made this concession to the fears and jealousies of the smaller States.

Great praise is due to those, not those who established a Senate with the express intention that the membership of that Senate should always be full, but to those who conceded equal representation to the States, large and small, in order to secure the formulation of a Constitution to be submitted to the people and the States.

Mr. Ellsworth, of Connecticut, was the leader of the party that insisted on equal representation in the Senate. He perhaps more than any other one of those who insisted that each State should have two Senators and that no State should be deprived of equal representation in the Senate without its consent was entitled to the credit of extorting that concession.

It was objected by Mr. Wilson and others that it was impolitic in any case to permit the governor of a State to fill even temporarily a vacancy in the Senate, but Ellsworth again insisted that as the legislatures met frequently no harm could come by conferring that exceptional power on the governor, as his power would be used for the appointment of men who could serve at the longest but a very short time.

Now, the first reported controversy involving the exercise of this exceptional power by the governor of a State originated in one of the smaller States. The legislature of Delaware failed to fill a vacancy. The governor of Delaware undertook to fill it by the appointment of Kensey Johns. Ellsworth, this apostle of equal representation, this man who had combated the inequality of representation on the floor of the Convention, this distinguished man who insisted on conferring the power to make temporary appointments on the governors, when he came to pass on the action of the governor of the smallest State in the Union in appointing a Senator to serve out a portion of a vacancy that the legislature had failed to fill, took ground against the contention of those who are now insisting that Mr. Quay shall be seated.

The PRESIDENT pro tempore. Will the Senator from Kentucky suspend for one moment? The Chair lays before the Senate the unfinished business.

The SECRETARY. A bill (S. 2355) in relation to the suppression of insurrection in, and to the government of, the Philippine Islands, ceded by Spain to the United States by the treaty concluded at Paris on the 10th day of December, 1898.

Mr. CARTER. I ask unanimous consent that the unfinished business may be temporarily laid aside.

The PRESIDENT pro tempore. The Senator from Montana asks unanimous consent that the unfinished business may be temporarily laid aside for the further consideration of the Pennsylvania Senatorial resolution. Is there objection? The Chair hears none, and it is so ordered.

Mr. LINDSAY. In the case of Kensey Johns this resolution was submitted to a vote of the Senate:

Resolved, That Kensey Johns, appointed by the governor of the State of Delaware as a Senator of the United States for said State, is not entitled to a seat in the Senate of the United States, a session of the legislature of the said State having intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.

On that question the yeas were 20, including Ellsworth, against 7 nays. So, then, we have this champion of equal representation solemnly voting in a case like the one we have at bar, only less objectionable, that the legislature having had the opportunity to fill the vacancy occasioned by the resignation of Mr. Read the governor of the State had no right to make a temporary appointment.

Thus we have the first reported case, arising under the Constitution affecting the smallest State in the Union, passed on by the special representative of the equality of the smaller States, adverse to the claim made by the friends of Mr. Quay under the appointment made by the governor of Pennsylvania.

I do not admit that it is competent to go behind the report of the committee on style to ascertain what the Convention intended the Constitution to be. We may read the speeches of members of that Convention; we may consider the votes upon the various propositions considered; we may have due regard to the gradual growth of each provision incorporated into the Constitution for the purpose of having light shed on the question we have under consideration, but we can not consider any of those matters to prove that the report of the committee on style, after having been adopted by the Convention, did not then express the exact will of that Convention.

The rule is universal that the final and concluding act of a deliberate body expresses its intent, notwithstanding any act done in the preliminary work leading up to that final act. When the Convention adopted the Constitution, as it appeared from the committee on style, it finished, it completed its work, it exhausted the authority it chose to exercise, and it was the Constitution as it came from the committee on style that was submitted to the thirteen States of the old Confederation for their adoption. When New Hampshire came to decide whether it would adopt the Constitution or reject it, when Virginia came to decide that question, when North Carolina came to decide that question, no man had the temerity to say that the committee on style, without authority, in violation of its duty, and without calling the attention of the members of the Convention to its action, had changed the phraseology of the provision as originally adopted, and thereby changed the meaning of that provision; and that hence what we have is not the Constitution the Convention submitted to the American people for ratification. No; we are to take the Constitution and its language as it left the committee on style, except where the Convention corrected the work of that committee, and we are to treat the paper that Virginia ratified, that Maryland ratified, that Delaware ratified, that Pennsylvania ratified, and that North Carolina, New York, and Rhode Island reluctantly accepted as the true Constitution of the United States.

If the language of the Constitution be plain, obedience to that language is the duty imposed on every Senator who has taken the oath to support and defend that Constitution. We are not to ask what the Constitution would have meant if one of the original provisions had been carried into effect, and we are not to ask what the Constitution would have meant if some speech made by a member of the Convention had been incorporated into the Constitution, but we are to ask, What does the language finally submitted by the Convention to the States and ratified by the States naturally mean? It means that the Representatives in the other branch of the Congress of the United States should be elected by the people, and it provides that whenever there may be a vacancy in the representation in the House of Representatives the executive of the State shall issue his writ of election to fill that vacancy, not to appoint ad interim, not to appoint temporarily, but to issue his writ for an election, of course within a reasonable time.

When we come to this end of the Capitol, we find that the legislatures are to elect, that the legislatures are to fill up the vacancies that happen from time to time, but that in a particular state of case, under a peculiar and extraordinary condition, the governors of the States shall have the power not to fill vacancies, but to make temporary appointments, the governors' appointees to serve until the legislatures shall have opportunity to fill the vacancies.

It is the established law of Congress, it is the established law of this Senate, that the legislature can not shirk the attempted performance of the duty to fill all the vacancies that may happen in the Senate of the United States. Some years ago the West Virginia legislature failed to elect. At the expiration of the term of the Senator who went out of the Senate the governor made an appointment. Then the governor called an extraordinary session of the legislature under the provision of the State constitution which authorized him to name the particular subjects on which the legislature might act, and which prohibited the legislature from acting on any other subject.

The legislature convened, and in the face of the executive action, in defiance of the executive call, proceeded to fill the vacancy then existing in the Senatorship of that State; and when the two gentlemen appeared here, one holding the certificate of the governor and the other holding the certificate of the legislature, the Senate decided, and properly, against the appointee of the governor and in favor of the appointee of the legislature, because the

power of appointment resides primarily in the legislature, and the governor can not in any way or under any State authority defeat the exercise of that power.

It is not for me to say that the governor of Pennsylvania has disregarded the express provision of the constitution of his own State for any other than a proper purpose; but it is a peculiar fact that the constitution of that State, which, to say the least of it, is in harmony with the Constitution of the United States, provides for exactly the contingency we now have, that the governor, instead of attempting to fill the vacancy by a temporary appointment, shall call the legislature together in extraordinary session, and give the legislature the opportunity to make the appointment.

It is not pretended when the term of Mr. Quay expired, the legislature then being in session and then engaged in attempting to elect his successor, that a vacancy had happened which authorized the governor to make the temporary appointment; but if the governor can fill by a temporary appointment a vacancy which happens while the legislature is in session and that continues after the adjournment, what prohibits him in principle from filling it the very day the term expires, notwithstanding the fact that the legislature is in session, if that legislature persists in its refusal or its failure to discharge its *plain* constitutional duty? There is no reason. If Governor Stone could make this appointment after the legislature adjourned because a vacancy then existed rather than happened, it is because he has the power to fill the existing vacancy, and, having that power, could have filled it as well while the legislature was in session as after it adjourned. He exercises the power not because the vacancy has happened, but he exercises the power because the vacancy happens to exist. The vacancy happened to exist on the 5th day of March as well as it happened to exist on the 5th day of May. Therefore, if he could fill a vacancy that happened to exist at the time he made the appointment, he could fill it as well when the legislature was in session as when it was not.

As to the word "happen," I do not attach controlling force to verbal criticism. The framework of the sentence determines the meaning of the sentence rather than any technical interpretation that may be put on any particular word used in the sentence.

When we are told that none but a lawyer could discover that "otherwise" does not necessarily mean "other ways." I say none but a lawyer, none but a most astute lawyer, could discover that the phrase "when a vacancy shall happen" means "when a vacancy shall happen to exist." If a man be killed this evening in a railway collision, we say he happened to come to his death by a railroad accident, but we do not say to-morrow that he happens to be dead to-day, or that he happens to be dead the day after to-morrow. The happening of the death was coincident with the time of the death, and none but an astute lawyer could give any other meaning to the word "happen" in that connection. Then, if a Senator dies, if he resigns, if a Senator be expelled, if a Senator refuses to take the oath of office, the vacancy happens when he resigns; it happens when he dies; it happens when he is expelled; it happens when he refuses to take the oath of office; but it does not happen the day after, nor the week after, nor two weeks after. The phraseology, without any kind of technical interpretation, speaks for itself, just as I insist "otherwise" necessarily speaks for itself in the connection in which it is used in the Constitution.

If the Convention had meant to say that a vacancy coming about in any way might be filled by a temporary appointment of the governor, the word "happen" might well then have been omitted, and the word "otherwise" most indubitably would have been omitted, and the language would have read that "if a vacancy happen, it shall be filled up by the temporary appointment of the governor until the legislature shall have the opportunity of filling it."

The word "otherwise" is used for some purpose, just as the word "happen" is used for some purpose, and as to the plain people of Georgia and South Carolina and New Hampshire—I will not include Massachusetts, but I will include Vermont—when they came to adopt the Constitution it never occurred to them that the word "happen" was to have no meaning and that the word "otherwise" had better have been left out of the Constitution and was put in through a mistake of the committee on style.

But the claim is the Senate is always to be full; that is, the membership is always to be full. Wisconsin is always to have two Senators; Kentucky is always to have two Senators; Vermont and New Hampshire are always to have two Senators each. If such was the intention of the framers of the Constitution, they only halfway did their work at best.

If the legislature fails to elect and the governor be in sympathy with the legislature and fails to appoint, then the State goes without equality of representation in the Senate, and therefore it was not contemplated by the Convention itself that all vacancies should absolutely be filled up.

When the objection was made that this was a power that ought not to be conferred on the governor, Mr. Ellsworth's answer was that it was a power that would not be exercised when the legislature was to meet in a short time.

So we have a Constitution which indicates that the membership of the Senate should always be kept full, except in cases in which the legislature and the governor are in sympathy, or in cases in which the legislature will speedily convene, and it is not necessary to make an appointment.

Now, let us apply that doctrine in this case. Suppose Mr. Quay to be qualified under the governor's appointment to fill the vacancy occasioned by the failure of the Pennsylvania legislature to elect, how long is he to serve? Suppose the next legislature shall fail to elect, what then? We have decided that the section which says the appointee shall serve until the legislature shall meet, means until the legislature shall adjourn. Then suppose the next legislature of Pennsylvania meets on the first Monday in December next—I do not know whether the Pennsylvania constitution contains a limitation on the time it may sit; but suppose it sits six months, and during all that time it fails to elect, then this appointment, instead of being temporary, to operate only for a short time, until the next legislature shall meet, will be an appointment that will operate for a year; and if the same influences which prevented the election of a Senator by the last legislature of Pennsylvania shall prove strong enough to prevent an election by the next legislature, the same power that clothes Mr. Quay with the authority to sit here for a year, may, the day after the next legislature adjourns, clothe him with authority to sit until another legislature shall be elected, and have another opportunity to elect his successor.

This is not what the Constitution means. It never was contemplated that the governors of States should have any power, except of the most exceptional character, to determine who shall sit and vote as a member of the Senate. To meet a temporary exigency, to meet a state of case that it was practically impossible to provide against, to give the governor the power temporarily to fill a vacancy that might happen until the legislature could act, was all that the people and the States who adopted the Constitution ever expected to confer, or understood they were conferring, on the governors of the States.

Why have we not two Senators to-day from Pennsylvania? Why have we not two Senators from Utah? Why have we not two Senators from the State of Delaware? It is because the legislatures of those three States have declined to perform an express duty imposed on them by the Constitution of the United States in the interests of the Republic, of which each of those States is a member.

It is said we may have three parties, that we may have a disagreement in the majority party, that the majority may nominate a man for whom a minority of the party will not vote, and that, by adhering to that man who can not receive a majority of the votes, they may defeat an election by the legislature and then call on the governor to make good the wrong that they have voluntarily inflicted on the people of the State. Are we to be told that the Republican party of the State of Pennsylvania, by refusing to unite on one belonging to their own party or by refusing to vote for anyone not a member of their party, has been prevented by some extraneous cause from exercising the right conferred on the State of Pennsylvania in order to secure its equal representation in the Senate, and that therefore an extraordinary case has been brought about in which a State executive may name a member of the highest legislative body in the Union; that the whole principle of our Government, the whole theory of our Government, may be overturned, not to meet a temporary exigency, not to meet an exigency that might not have been provided against, but to enable a governor to exercise a nonexecutive function, to meet an exigency deliberately brought about by the refusal of the body charged with the duty of making the election of a Senator?

Our ancestors did not contemplate that the boon, so much esteemed, so highly prized by the States of the Union, that each should have equal representation on the floor of the Senate, would be ruthlessly thrown away out of adherence to party spirit or to personal pique, and that that being done, then the Senate of the United States would recognize the power of an executive to undertake to keep the membership of the Senate full.

If Pennsylvania has not equal representation here to-day, the fact is chargeable to the people of Pennsylvania; if Utah has not equal representation here to-day, the fact is chargeable to the legislature of Utah. So with the legislature of Delaware.

No State is to be deprived of its equal representation in the Senate without its consent; neither is any State to be compelled against its consent by the unauthorized action of the Senate of the United States to keep its membership full. That is the point we reach at last. The constitutional provisions are ample. The legislature of Pennsylvania, with a Republican majority of forty or fifty, could have elected a Senator if that legislature had chosen to do so. That legislature, by reason of local animosities, local dissensions, personal objections, or some other cause which has no

lodgment in the theory of our Government, refused to perform a plain and manifest duty; and now we are asked not only to say the governor may make a temporary appointment to fill the vacancy until the legislature can have an opportunity to act, but that we are to strike from the constitutional provision the word "recess" in order that we may assist the governor to do that which under the letter of the Constitution he could not do, but which duty, if it be a duty, has been imposed on him by the deliberate refusal of the representatives of the people of Pennsylvania to discharge their plain and manifest duty.

Now, let us see what the provisions of the Constitution are:

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

That is the rule as to the House of Representatives.

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year.

That much of the paragraph has ceased to be a living provision of, because all the duties provided for by that paragraph have been performed, so that taking the Constitution as it now stands it reads thus:

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Now, I submit to the Senators whether or not that provision, read by any other than a technical and astute lawyer, would ever convey the impression that it did not contain all the language it was intended to contain, and that every word contained in it was necessary to express the intention of the framers of that instrument.

And if vacancies happen—

Not if vacancies happen to exist—

by resignation, or otherwise, during the recess of the legislature.

If the member happens to die, if the member happens to resign, or if, on the day he ought to qualify, he happens to refuse, or if by reason of some misconduct after his election he happens to be expelled, then we have reached the point which determines whether or not it is the duty and the power of the legislature or the duty and the power of the governor to fill the vacancy. If the vacancy happens when the legislature is not in session or is in recess, then the governor makes a temporary appointment. If it happens when the legislature is not in recess, then the governor has no authority under the plain letter of the Constitution to make the appointment. The duty at once devolves on the legislature.

The Congress of the United States has undertaken to deal with this question by the act of July 25, 1866, an act to regulate the time and manner of electing Senators by the legislatures of the States. Section 17 provides:

Whenever, during the session of the legislature of any State, a vacancy occurs in the representation of any State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

The legislature which convenes next preceding the expiration of a regular term shall, on the second Tuesday after its organization, proceed to elect a Senator to fill that term and shall meet each day until the election is made. That is the act of Congress. If a vacancy occurs when the legislature is not in session, what then?

Whenever, on the meeting of the legislature of any State, a vacancy—

Not happens—

a vacancy shall exist in the representation of said State in the Senate, the legislature shall proceed, on the second Tuesday after meeting and organization, to fill such vacancy in the manner described in the preceding section for the election of a Senator for a full term.

Now, both branches of Congress had the Constitution in view when this enactment culminated into a law. The President of the United States had the Constitution in view when he approved this enactment. So, then, we have the concurrence of opinion between both branches of the Congress of the United States, supplemented by the opinion of the President of the United States, which declares how the legislature and when the legislature and what methods the legislature shall adopt in the election of a Senator to fill a full term; and then we have the provision that if a vacancy shall exist at the time the legislature convenes—not shall happen at the time the legislature convenes—the legislature, on the second Tuesday after it convenes, shall proceed to fill that vacancy. Then we have the third provision, that if the vacancy shall occur or happen during the session of the legislature then, on the second Tuesday thereafter, the legislature shall proceed to fill the vacancy.

In this case what happened? The vacancy occurred, if it did occur, or it happened, if it did happen, while the Pennsylvania legislature was in session. An act of Congress provides that on the second Tuesday, after notice thereof, the legislature shall proceed to fill the vacancy. In the language of the statute the vacancy occurred on the 4th day of March last. In the contention of those who insist that Mr. Quay ought to be seated it also happened after the legislature adjourned, although it had occurred while the legislature was in session.

I see no reason why the precedents that bound the Senate, why the precedents that controlled the Committee on Privileges and Elections, why the precedents to the binding effect of which the governor of Kentucky and his appointee had to submit, shall not apply to the State of Pennsylvania and to the governor of Pennsylvania and to the appointee of that governor, and require that State and its governor and his appointee to submit to those precedents, just as the Committee on Privileges and Elections required the State of Kentucky and its governor and his appointee in March, April, and May, 1897, to submit to the then existing precedents.

Mr. SPOONER obtained the floor.

Mr. CHANDLER. If the Senator from Wisconsin will allow me to answer a question put by the Senator from Kentucky, I should like to do so.

Mr. SPOONER. Certainly.

Mr. CHANDLER. The Senator from Kentucky I understood to cite the case of Capt. Andrew T. Wood, who was appointed on the 5th of March, 1897, to a vacant seat in the Senate by the governor of Kentucky. I think the Senator complained of the Committee on Privileges and Elections, naming the Senator from Massachusetts, because they had not secured the seating of Captain Wood under that appointment. Did I understand the Senator aright?

Mr. LINDSAY. That is not precisely the way I stated it. What I complained of was not that you did not do right, but that, according to your own theory as now advanced, Wood had the right to expect that you and the Senator from Massachusetts would at least submit a report that he was entitled to sit as Senator.

Mr. CHANDLER. The Senator, I think, said we smothered the credentials.

Mr. LINDSAY. The committee smothered them.

Mr. CHANDLER. I understood the Senator to say we smothered the credentials. Mr. Wood was appointed by Governor Bradley on the 5th of March, after Senator Blackburn's term had expired, and came on to the extra session on the 10th of March. His credentials, being an appointment by the governor, were presented, and the Senator from Massachusetts [Mr. HOAR] moved that he be permitted to take the oath. The Senator from Maryland, Mr. Gorman, moved that the credentials be referred to the Committee on Privileges and Elections. The Senator from Massachusetts said under the circumstances he would not resist that motion. On the 13th of March the legislature of Kentucky was called in extra session. On the 28th of April Mr. DEBOE was elected, came here, and was sworn, in on an election by the legislature, on May 5.

Now, the only reason why the Committee on Privileges and Elections did not take action in that case was because there was not time enough; that is all. It was not because the Senator from Massachusetts [Mr. HOAR] or I had any doubt about his right to be admitted to a seat, but we had been practically notified by the Senators who maintain the opposite contention to that which we advocate that he could not be seated without a contest, and, having in mind the lengthy debate which the opponents of the seating of Captain Wood could maintain, having on their side the eloquent and diffuse Senator from Kentucky, the committee simply omitted to make a report; and the fact that they did omit to make a report, when an extra session of the legislature of Kentucky had been called, is hardly to be imputed to them under the circumstances as a delinquency.

If the Senator from Wisconsin will allow me, I will say one word further in reply to the Senator from Kentucky in reference to his argument that this question ought to be treated as res adjudicata. The Senator from Massachusetts briefly answered the point yesterday, and I only wish to read three lines from the report of the Committee on Privileges and Elections in which the committee unanimously recommend the Senate to decline to reopen the Du Pont case. The Senator from Massachusetts says:

We have no doubt that a legal doctrine involved in a former judgment of the Senate may be overruled in later cases.

That principle is distinctly stated. The Senator from Kentucky understands it very well, and the argument as to res adjudicata indulged in by the Senator from Kentucky and the Senator from Connecticut, with all due respect, is not warranted by anything found or omitted in the report in the Du Pont case.

Mr. LINDSAY. The Senator from Wisconsin will indulge me for a moment. The point I make as to res adjudicata is that when

a motion for a rehearing is pending the judgment is not res adjudicata or stare decisis. The question is whether it is correct. The point I want to get at is whether there was any notice given to the Senator in the Kentucky case that there would be a lengthy discussion, that he did not have in the Quay case, and whether or not the shortness of the time justified the Committee on Privileges and Elections in not even making a report on which Mr. Wood might base a claim for compensation and mileage, and show that he was not a mere political adventurer.

Mr. CHANDLER. I do not know that the Senator notified us that he would debate at great length against the right of Mr. Wood's admission, but it was perfectly well understood that he could not come in without a fight. It was not wholly the fear of opposition in the Senate; it was not largely that fear. It was the fact that a session of the legislature was almost immediately called, on the 13th of March, and if an extra session of the legislature of Pennsylvania had been called as soon, I assume the Committee on Privileges and Elections now would not have hastened to report in the case of Senator Quay.

Mr. LINDSAY. That was the same legislature which had failed to elect in the last year.

Mr. CHANDLER. Yes.

Mr. LINDSAY. And the point is now made that the governor of Pennsylvania could very well disregard the constitution of Pennsylvania because he would have to call the same legislature together.

Mr. CHANDLER. The governor would have had to call together a legislature that had had an opportunity to elect, that had tried a great while to elect and had not succeeded; and according to the argument of Senators on the other side, if it is good for anything—I do not think it is—the State had committed a fault in not sending a Senator here, and therefore the governor should not call the legislature together.

Mr. LINDSAY. That is exactly what the governor of Kentucky did. He called the legislature that failed to elect. He made an appointment in the interim, and the Committee on Privileges and Elections without hesitancy let Kentucky go for two months without a Senator.

Mr. CHANDLER. According to Senators on the other side, it was very presumptuous, after the legislature had had a chance to elect and had not elected. The State, of course, according to their argument, should be punished by going without a Senator.

Mr. SPOONER. Mr. President, it is not my purpose to enter upon any elaborate discussion of the questions which are presented by this case. I simply desire, and I hope I may be permitted to do so briefly, to restate in a general way my view upon the subject in explanation of my vote. At a former session, as a member of the Committee on Privileges and Elections, it became my duty to submit to the Senate a laborious and elaborate argument upon the subject. I think I need not say that it was a sincere one. It was not a partisan case at all, for there was no contestant. I was at liberty, as every other Senator almost was, to treat the subject as nova res, a case of first impression. That was the Corbett case. I reached the conclusion that Mr. Corbett was as much entitled to a seat in this body as I am, and I knew then, and so stated in the opening of my remarks, that he would not be seated.

Those who supported his claim to a seat with me were not very successful in convincing the Senate. I have flattered myself sometimes with the notion that that was partly due to the fact that comparatively few Senators listened to the speeches; and the Corbett case in that respect did not differ from this case. I did not even succeed in convincing either of the Senators from Pennsylvania—Mr. Quay or Mr. PENROSE—that, the legislature having met and failed to elect a Senator, the governor nevertheless under the Constitution had the power to make a temporary appointment. That debate and this certainly show one thing beyond question, and that is that it is a debatable proposition.

Yesterday and to-day I listened to arguments, very strong ones, against the right of Senator Quay to a seat here under this gubernatorial appointment, in which it was assumed, if not stated, that the contention is supported by the *plain* language of the Constitution, and that there really is but one side to the matter. I think there is hardly a clause in the Constitution which from the beginning has excited more controversy than this one relating to the appointment by the governor of a Senator. Able lawyers have discussed it on both sides, and for anyone to say now that it is a plain clause, and that its language is not susceptible of construction, because it is so plain that construction has no office to perform, is rather a poor tribute to the intelligence of the men—distinguished men, too—who during fifty years have from time to time discussed it elaborately in this body.

It is purely a constitutional question, Mr. President, and nothing else. If Mr. Quay, under the Constitution, is entitled to a seat here, he ought to have it. If Mr. Quay, under the Constitution, is not entitled to a seat here, he should be excluded. Personality has no decent part to play in this question, and I do not impugn the motive of any man who differs with me upon it.

Much time has been taken here in discussion upon the doctrine of *stare decisis*, and some time has been taken in discussing the doctrine of *res adjudicata*. They are very different to a lawyer, so different as not even to be "of kin." *Res adjudicata* relates to the case in judgment. *Stare decisis* relates to the principle. When a case has passed to final judgment that case is ended. Yes, it is ended, because it is adjudicated, or, as the Senator from Maine [Mr. HALE] says to me, because it is an adjudicated thing. It is settled, and as to individual controversies, there must be an end, in the nature of things, to contention.

The doctrine of *stare decisis*—well known and enforced by the courts, a doctrine based upon the public interest and necessity—is different. The courts in some cases hold themselves bound by the doctrine of *stare decisis*, when, if the question were a new one, they would depart from the former decision. Why? Because it has become a rule of property and a basis for contracts. It has been so acted upon in the community, in the Commonwealth, or in the country that infinite harm would come to vast interests if the court should depart from it.

Not so as to that class of controversies or questions upon which rests no general property right. The courts often change their decision upon principles. The books are full of overruled cases. The list of overruled cases in this country would make a book as large as the Revised Statutes of the United States, if not larger. The highest courts of the States and the highest court of the United States have often overruled former decisions. So this doctrine of *stare decisis* is one limited in its scope. The supreme court of Texas—and to it I called the attention of the very few Senators who were then present, in the argument on the Corbett case—in drawing a distinction between the classes of cases, said:

> The proper determination of each of these cases depends upon the validity or invalidity of the "act to organize and maintain a system of public schools," approved April 24, 1872, and the authority conferred thereby to collect the taxes brought in question in them. The constitutionality of this law, and the liability of the taxpayers for these taxes has been sustained by this court. * * * It may be, therefore, thought that the question should not be regarded by us as now open for discussion—that whatever might be our views in respect to it, upon the principle of *stare decisis* we should hold it as definitely settled and concluded.
>
> We can not, however, regard the rule of *stare decisis* as having any just application to questions of the character involved in these cases. This doctrine grows out of the necessity for a uniform and settled rule of property and a definite basis for contracts and business transactions. If a decision is wrong, it is only when it has been so long the rule of action as that time and its continued application as the rule of right between parties demand sanction of its error; because, when a decision has been recognized as the law of property and conflicting demands have been adjusted and contracts have been made with reference to and on faith of it, greater injustice would be done to individuals and more injury result to society by a reversal of such decision, though erroneous, than to follow and observe it. But when a decision is not of this character, upon no sound principle do we feel at liberty to perpetuate an error into which either our predecessors or ourselves may have unadvisedly fallen merely upon the ground of such erroneous decision having been previously rendered.
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> The questions to be considered in these cases have no application whatever to the title or transfer of property or to matters of contract. They involve the construction and interpretation of the organic law and present for consideration the structure of the Government, the limitations upon legislative and executive power as safeguards against tyranny and oppression. Certainly it can not be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis*.

Mr. President, this is only a judicial body *sub modo*, even in the consideration of such questions as are here involved. It is not a court as the judicial tribunals are courts. When you go before a bench to argue a case the judges are there and they generally listen to your argument. That is rarely true in the Senate.

It was not true in the Corbett case. It is not true in this case. This is a political body. Every member of this body is a political leader in his State. It does not follow from that that we should not and that we will not decide these controversies in a conscientious way; but in passing upon them, in discussing them, in acting upon them, we are not acting in the calm atmosphere of a court from which ordinarily partisanship is excluded.

I remember reading a statement of Senator Butler, of South Carolina, an able man, referring to the decision of the Senate in the Tracy case, in which he said it was decided upon party lines. If Senators will take Taft's Election Cases and look at the large number of cases which arose during the war, they will find that in very many of them they were decided upon party lines. Each Senator here takes an oath to support the Constitution of the United States. If he is a man of honor—and every Senator is that, of course—he will keep that oath. He supports the Constitution as he believes it to be, not as some one else in this body believes it to be.

Mr. TILLMAN. Mr. President, right there, if the Senator will pardon me, will he tell us upon what theory or basis those will vote who are going to vote on this question differently from the way they voted on the Corbett case?

Mr. SPOONER. That is a question for the Senator to put to

the Senators who are going to vote differently, if any are. I shall vote——

Mr. TILLMAN. I understand that there are some.

Mr. DANIEL. Will not the same question apply to those changing from the way they voted in the Mantle case?

Mr. TILLMAN. Certainly; or any case of a similar character.

Mr. SPOONER. Judges change their minds. I have not the highest possible opinion of a man who can not change his mind, and if a man changes his mind conscientiously, as he may, and therefore changes his vote, he is to be honored for it, not criticised for it. I have not changed my mind.

Mr. TILLMAN. What becomes of the Constitution under those conditions?

Mr. SPOONER. A Senator can change his mind about the Constitution just as courts have done.

But, Mr. President, what I mean to say is this: Each Senator enters into this obligation. It is a matter between him and his own honor and his own conscience. It is a matter for him to settle by the best light he can obtain for himself. If my view of the Constitution, formed after study, formed with perfect sincerity, leads me to believe a State is entitled to be represented here, when the question is later presented I can not change my oath or my sense of obligation because on some other occasion a majority of this body, lawyers and laymen, have taken a different view of their duty.

I do not undervalue precedent. Precedent, however, upon such a question should shackle no one here or elsewhere. If the precedent made by the Senate in the Corbett case is right, it should be adhered to—adhered to, Mr. President, not because it is precedent, but because it is right; and if the precedent made in the Corbett case is wrong, it should be abandoned because it is wrong.

Mr. HALE. Let me ask the Senator a question right upon the point of which he is now speaking.

Mr. SPOONER. Certainly.

Mr. HALE. Does not the Senator think if in the Mantle case the decision had been his way, and in the Corbett case the decision had been his way, that from the beginning of this case in the Committee on Privileges and Elections, and in the debate in the Senate we would have heard not much except the doctrine of *stare decisis* dinned into our ears by the Senator from Massachusetts, who is, so far as modern times go, the father of this doctrine that the Senate must always be full, and by everybody else who has followed him. It would have been difficult, would it not, I ask the Senator, for any of us who are opposed to him and his view now to have got our voices above surface for the reason that we should have been met at every turn and every moment by the declaration that twice the Senate had settled this great question on full debate. Does not the Senator believe that?

Mr. SPOONER. Very likely. I do not know how much the Senator from Massachusetts would have dinned into the Senator's ears. I know one thing: I should not have attempted to apply the doctrine of *stare decisis*. I should have urged, if the Senate had seated Mr. Corbett and the question were again before the Senate, that they should adhere to that view if they continued to think it the correct view, and I should have made as good an argument as I could that it was the correct view.

Mr. HALE. Then the Senator comes to this result, that practically in cases of this sort in the Senate there is no such thing as the doctrine of *stare decisis*, but that each case as it comes up must be decided for the time being. Now, I ask the Senator, does he think that it is a good thing in the life of the Senate that a great question of this kind should be always repeatedly up before the Senate? Does he not think, as a matter of guidance to legislators and to governors, it is better that there should be an end, not, as lawyers say in the courts, of litigation, but of contention on a subject of this kind, and does the Senator think for a moment that if it should happen in this case that the contention which he is making for the minority of the committee should be settled by a bare majority that would settle it in the future?

Mr. SPOONER. No.

Mr. HALE. The Senator does not want it settled in the future.

Mr. SPOONER. I did not say that, did I?

Mr. HALE. Is not that the situation?

Mr. SPOONER. Must I vote with you against my convictions in order to settle it for the future?

Mr. HALE. But I am asking the Senator as a lawyer, and a good lawyer, as a legislator, and a very valuable legislator, and as a thoughtful man who is full of thought, whether he thinks it is not better that in this body some time or other this question should be settled, so that governors may know and legislatures may know what is the line of action to be pursued?

Mr. SPOONER. Oh, Mr. President, the Senator from Maine would consider it settled, I suppose, and eternally settled, so long as it is settled his way.

Mr. HALE. No, I do not think that; but it happens to be the fact that it has always been settled in my way.

Mr. SPOONER. Suppose it had not been settled your way?

Mr. HALE. I should have given it up.

Mr. SPOONER. I do not know.

Mr. HALE. I should have given it up.

Mr. SPOONER. The Senator would have to change his nature to give it up. The Senator would say that in all his votes he had been governed solely by a sense of his constitutional obligation, and unless he changed his mind, so long as the question was presented to the Senate, he would discharge his obligation as a Senator as he understood the Constitution to be.

Mr. HALE. Now the Senator——

Mr. SPOONER. I think I do the Senator that justice.

Mr. HALE. The Senator is wrong there.

Mr. SPOONER. I withdraw the compliment.

Mr. HALE. I will take the other side as the higher compliment, that on a great question of this kind, thoroughly discussed, I may say, for ages, with strong convictions one way or the other, particularly if I had participated in two consecutive struggles and the Senate had voted against me, I should say that is settled, because, Mr. President, it is the fact that in any discussion that has taken place heretofore, almost every Senator, with the exception of the Senator from Wisconsin, has made it a part and a feature of his argument in the case that this question ought to be settled; that it should not be continually coming up to pester us.

Mr. President, there are Senators in this body who are good lawyers, better lawyers than I am, as good lawyers as is the Senator from Wisconsin a good lawyer, whose action to-day will be based upon the fact that this matter has been fought out and settled by the Senate. They will vote upon that ground, and I shall be content to vote on that ground.

Mr. SPOONER. The Senator asks me if I think this question ought constantly to be protruded in the Senate. I tell him, no. I regret that the question is here now, but it is here now. I shall be glad if the discussion of it shall lead either to legislation or to constitutional amendment which will prevent, as far as it is possible to do it, such questions hereafter as to the right of Senators to their seats.

I was not enamored of this doctrine of *stare decisis* or the value of precedent by the Corbett case and the manner in which it was disposed of. Arguments were used around this Chamber against Mr. Corbett, in debate and otherwise, based on personal charges, too, which never found their way into the committee room and as to which before the committee he was never for one moment challenged. How much weight they had with Senators I do not know; I do not care. That does not often happen in a court. There are many grounds for upholding the doctrine of *stare decisis* and the value of precedent in the courts which do not apply to the Senate.

But, Mr. President, I desire to proceed. This question is here. The Senator will vote upon it as he thinks is right. I will vote upon it as I think is right. If the Senator, having sworn to support the Constitution of the United States, believed that the Constitution, properly construed, entitles the State of Pennsylvania to its representation here in the Senate, I very much doubt if he could persuade himself to vote against that representation simply because a majority in the Corbett case or in some other case had reached a different conclusion.

Now, Mr. President, some things about this are admitted. I admit, as I have always admitted, that it is only the legislature of the State which can "choose" a Senator or which can *fill* (using the word in the sense in which the Constitution uses it) a vacancy in the Senate. But in construing this constitutional provision, one of the greatest conceivable importance, one devised by the framers of the Constitution for a beneficent purpose, it, in my judgment, ought not to be read through a microscope.

Constitutions are not ordinarily construed in that way. You are not to look solely at the letter, ignoring utterly the purpose; you are not to look only at the body, ignoring utterly the spirit; nor are you permitted to look solely at the particular clause, ignoring other portions of the instrument in which the same language is used in almost the same connection; by that I mean in connection with vacancies in Federal offices. The whole instrument is to be read. The provisions *in pari materia* are to be considered, for where there is any question as to construction they throw light upon it.

The language is:

> If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments—
>
> Temporary appointments—
>
> until the next meeting of the legislature, which shall then fill such vacancies.

Each State is given two Senators in this body. The Government was made by the States and for the States. Every star in the blue field upon our flag represents a State. We have added many to it; we have never permitted one to be taken from it.

This is the only body in the Government where the State as a State speaks.

One of the greatest contests in the Constitutional Convention was over the representation which should be given to the various States in the Senate. Some insisted upon proportionate representation; others upon a different basis; and out of the struggle (and this should never be forgotten in reading this clause) came the compromise which gave to the States equality in the Senate. Without this compromise, resulting in equality of the States, there would have been no Constitution. This is historically true. It was the purpose that in this Chamber the States then in the Union and thereafter to come into the Union should stand forever equal—not equal in area, not equal in population, not equal, Mr. President, in intelligence, not equal in wealth, nor in mountains and valleys and streams, but equal in the number of Senators, equal in votes, each Senator having one vote in this body.

In construing this language of the Constitution, not altogether apt, not altogether happily chosen, else this long-continued controversy over its construction would not have arisen, I have not found myself able to shut out the great light which comes from the Convention room as to the governing purpose of the Convention concerning the representation of States in this body.

Mr. CULBERSON. Mr. President, I should like to ask——

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from Texas?

Mr. SPOONER. Yes, sir.

Mr. CULBERSON. I should like to ask the Senator from Wisconsin if he believes before the election of Senators of the first Senate the governor of any State had authority to appoint?

Mr. SPOONER. I think not.

Mr. CULBERSON. Why not?

Mr. SPOONER. Because of the classification provision of the Constitution.

Mr. CULBERSON. Then I will ask this question: Does not that classification clause of the Constitution indicate that the vacancies contemplated to be filled by governors were those resulting not from efflux of time, but by reason of the casualties mentioned in the Constitution?

Mr. SPOONER. Mr. President, I will get to that in a moment.

If vacancies happen by resignation, or otherwise, during the recess of the legislature, etc.

I have never been able to persuade myself that that word "happen" was there used——

Mr. CULBERSON. If the Senator will pardon me, I lay no stress in this question upon the word "happen."

Mr. SPOONER. The Senator mentioned "casualty," and I supposed he was referring to the word "happen."

Mr. CULBERSON. The Constitution provides, if the Senator will permit me, that immediately after they shall be assembled in consequence of the first election, they shall be divided as nearly as may be into three classes. Then immediately after the classification and in the same clause of the Constitution it provides that if vacancies happen they shall be filled in a certain manner. Now, does it not follow that the filling of vacancies is provided for after the election to the full term by the original election body, to wit, the legislatures of the several States?

Mr. SPOONER. I have no doubt whatever that that is not correct. I think after the first Senators have been elected and classified that it is not necessary, in order to give the governor jurisdiction to make a temporary appointment, that the vacancy must occur by some fortuitous event—death, expulsion, or something of that sort—after the term shall have been filled.

Mr. HALE. Mr. President——

Mr. SPOONER. If the Senator will permit me, others desire to speak, and I am anxious to conclude.

Mr. HALE. I had some thought of saying a few words myself.

Mr. SPOONER. I want to give the Senator an opportunity, if I can.

Mr. HALE. But in order that we may help the Senator out of his dilemmas I am willing to waive that entirely.

Mr. SPOONER. Will the Senator kindly inform me of the dilemma which he proposes to help me out of?

Mr. HALE. I want the Senator to explain, if this doctrine that the Senate must be full and that the entire provision put into the Constitution by the fathers had for its life and spirit the one thing, that each State must always be represented here by two Senators, why that broad doctrine does not cover the question suggested by the Senator from Texas [Mr. CULBERSON], that originally had there been any failure the governor must himself, of himself, and of his power secured what was the great desideratum, the two Senators in their place from each State. I do not see how the Senator has answered the question of the Senator from Texas. It seems to me that if his argument covers that it covers everything. The one thing, the sole thing, the fathers thought of was not of the machinery, not of classification, but that always there should be in the Senate two Senators from each State.

Mr. SPOONER. Is that the dilemma?

Mr. HALE. That is one dilemma.

Mr. SPOONER. Will the Senator notify me as rapidly as he can of the various dilemmas that he thinks he can help me out of? I think it is very clear, Mr. President, and it has always been so considered, that this language applies only to vacancies which occur after Senators have been once chosen and classified. I never have heard anyone contend the contrary. "If vacancies happen by resignation." That implies that the office has been once filled, for a man could not very well resign or refuse to accept a seat in the Senate if he did not have it to resign. He could not be expelled if he were not a member. He could not accept an incompatible office so as to interfere with his tenure in the Senate unless he was in the Senate.

I have always assumed, and I think it has always been assumed by everyone, that original vacancies can only be filled by the legislature and that the power to make a temporary appointment would never arise until after an election and subsequent classification. The authority to make a classification is given only after an election. The Constitution clearly shows that in its provision for the classification of the first Senate:

Immediately after they shall be assembled in consequence of the first *election*, they shall be divided as equally as may be into three classes.

It has never before been contended or suggested that the governor of a State just admitted into the Union could appoint the first Senators, or that appointed Senators could be classified, and no such construction follows from the contention which I am making.

Mr. STEWART. Will the Senator allow me just one word there?

Mr. SPOONER. Well, yes.

Mr. STEWART. The State has no place until it is assigned to it. No vacancy can occur under the Constitution until the Senate assigns the places to the States. The State does not know what place it is going to have until it is assigned.

Mr. SPOONER. The legislature of a State must choose the first Senators. The governor can not choose Senators. When the legislature shall have chosen Senators, and they shall have been classified under the provisions of the Constitution, then the vacancies which occur after that may, within certain limitations, be temporarily filled by the appointment of the governor.

Mr. TILLMAN. Will the Senator permit me?

Mr. SPOONER. If the Senator will allow me to go on, I wish to finish in order that others may speak. We are to vote at 4 o'clock, and I hoped that I might be permitted to proceed without interruption, for I desire to be brief. However, I will yield to the Senator.

Mr. TILLMAN. I wish to ask the Senator whether there is no difference in his mind between vacancies that occur after a seat has once been filled—that is, vacancies that would happen—and vacancies that occur by reason of the limitation of the term?

Mr. SPOONER. I will get to that.

Mr. TILLMAN. This case is one in which it was known far ahead, when Mr. Quay was first elected, that his term would end on the 4th of March of last year. It did not happen. There is no casualty about it; there is no accident.

Mr. SPOONER. Is there any casualty about a resignation?

Mr. TILLMAN. Of course.

Mr. SPOONER. Is there any accident about a resignation?

Mr. TILLMAN. There is this about it, that the framers of the Constitution could not provide for all these things.

Mr. SPOONER. They did provide for vacancy caused by resignation, however. But is there any accident or casualty about a resignation?

Mr. TILLMAN. It was not in contemplation when a man was elected, for "few die and none resign."

Mr. SPOONER. But the contention is, upon the word "happen" and, that the use of the word "happen" makes it plain that the framers of the Constitution only intended that a vacancy should be filled by a temporary appointment when the vacancy had occurred through some fortuitous event.

Mr. TILLMAN. In this case——

Mr. SPOONER. Is a resignation a fortuitous thing? It is purely voluntary. As I had the honor to say in the Corbett case, if it were otherwise than voluntary, it would be invalid. But I will answer his question, if the Senator will permit me, as I go along. I have never been able to persuade myself that the framers of the Constitution used the word "happen" in any other than a generic sense, or used it as indicating that the only vacancies which could be filled by gubernatorial appointments were vacancies which were accidental, the result of casualty or fortuitousness. Why did they provide for temporary appointments at all?

In some of the States, as appears from the proceedings of the Convention, the legislatures met *oftener than once a year*. The governors had the power to call them in extraordinary session. Why did they provide for this temporary appointment at all? They did not provide that the governor might fill a vacancy in the

House of Representatives temporarily. They provided that as to the Senate the governor might fill a vacancy temporarily. Why? Because they deemed it of such vital consequence that the States should remain equal in votes in this body. No other consideration imaginable could have influenced them.

The Senator from Kentucky [Mr. LINDSAY], who made, as he always makes, an able argument, called attention to the fact that this provision is an anomalous and unique one. I agree to that. He called attention to the distinction made by the Constitution between the coordinate branches of the Government, and to the fact that it is not an executive function to choose or appoint a legislator. I agree to that. It is unique; it is not in harmony with our general system; but it is in the Constitution. Why was it put there?

Why did the framers of the Constitution invest the governor of a State with this extraordinary power of appointing a Senator of the United States temporarily? Only because, Mr. President, of their great anxiety that there should be no "inconvenient chasm" in the State representation in the Senate; only because of their anxiety that the compromise which gave to each State two Senators should to the fullest possible extent be carried forward and safeguarded. The Senator from Kentucky finds in that strange provision, or rather in its uniqueness, an argument against our contention. I find in it an argument for it.

Mr. WELLINGTON. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from Maryland?

Mr. SPOONER. Yes.

Mr. WELLINGTON. I ask the Senator if I may interrupt him for just one question?

Mr. SPOONER. Certainly.

Mr. WELLINGTON. I should like to ask the Senator whether he can not find some other reason than the one which he assigns for giving to the executive of a State the appointment of a Senator under the circumstances? I can find one, and it is this: It was, as the Senator himself eloquently has said, the intention of the makers of the Constitution that the House of Representatives should be chosen by the people and that the choosing of a Representative should always remain with the people. Therefore the governor was not allowed to appoint a member of the House of Representatives: but, on the other hand, it was the intention of the framers of the Constitution that the legislatures, and not the people, should elect a Senator. Therefore it was their intention that it should not go to the people under any circumstances. What other power was there that could fill a vacancy, if it was to be filled, except the governor of the State?

Mr. SPOONER. The Senator gives a reason why the Constitution does not provide for an appointment by the governor to fill a vacancy in the representation from a State in the other House. He does not controvert the statement of the Senator from Kentucky, nor does he controvert at all the argument which I was making, and that is this: That the very fact that the framers of the Constitution industriously gave this power to the governor is conclusive evidence that they did not intend, except in the rare cases where it was absolutely unavoidable, that the States should be without full representation in the Senate. Otherwise they certainly would have made no provision for temporary appointments at all. They had fought for equality of States in the Senate, and they intended to secure it to the utmost practicable extent.

Now, Mr. President, I shall not spend time to make the philological argument upon this word "happen" or upon the language of the succeeding clause. I made it once, and I do not care to repeat it.

Mr. President, from an early day to this, although it has been often debated, the meaning of this word "happen" and the question whether the governor in exercising his power of appointment is limited to vacancies occurring after the term has once been filled, and it has been decided thirteen times that that is not the proper construction of the Constitution. How could it be otherwise? To impute a contrary purpose to the framers of the Constitution would be to impeach their intelligence, and would be to say that they forgot the great purpose of the struggle to give the States equality in this body.

Could it be ever imputed to them that it was their intention, carefully providing here as far as might be for continued equality in the Senate, that if a man was elected to the Senate by a legislature and refused to accept, there should be a vacancy until another legislature met and elected? Was it their intention to leave this provision of the Constitution in such plight that if a man was elected to the United States Senate by a legislature and died on his way to the Capitol to take his oath a vacancy must continue? Not at all. And so, Mr. President, I say without hesitation that it is, not only upon reason, but upon precedents rightly made, settled that the governor, notwithstanding the use of this word "happen," has the power to fill a vacancy temporarily, even if the term has not been once filled.

I never yet have been able to become reconciled, Mr. President, to the doctrine of the Corbett case. Precedents, it is true, may be invoked for it. The debates upon the early precedents are scant. Upon those of later years they are more elaborate. I have considered the Smith case, of Maryland, and the Sevier case, of Arkansas, as necessarily overruling the earlier precedents. If the governor may make a temporary appointment to fill a vacancy at the beginning of a term because of the death of a Senator elected by the legislature, or his refusal to accept, as seems to be well settled, it is difficult to see why one may not be so temporarily appointed where the legislature failed, for one reason or another, to choose.

I doubt if the framers of the Constitution contemplated the failure of legislatures to choose, but it has seemed to me clear that they did not intend that the power of temporary appointment should be restricted to defeat the purpose for which it was inserted in the Constitution. Such appointment, it must be constantly borne in mind, does not fill the vacancy, but provides a Senator temporarily to exercise the functions and subserve in the interim the interests of the State and of the country. The necessity for a temporary appointment would be as great in one case as in another. They made it, so far as language could do so, compulsory upon the succeeding legislature to then fill such vacancy, and doubtless did not contemplate a failure in the performance of such duty.

Mr. TILLMAN. If the Senator will excuse me, I will interject another idea and then let him elaborate that, and will not interrupt him any more. In this case which we are discussing the question as to the recess of the legislature enters in very largely.

Mr. SPOONER. I will come to that.

Mr. TILLMAN. Very well. I shall not interrupt the Senator further, if he will touch on that point.

Mr. SPOONER. I will touch on it, and I will touch on it rapidly, and finish if I may.

Mr. President, in the Corbett case, when the 3d day of March came, there was a vacancy in the Senate, caused by the expiration of the term of Senator Mitchell, and the legislature of Oregon was not in session. It was in "a recess of the legislature;" and by the plain language of the Constitution, as I read it without construction, the governor had the power to appoint:

> If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments.

And in the case of Corbett, when the vacancy happened, it was during the recess of the legislature. Why did not the governor have the power to appoint? Because, Senators say, the legislature had been in session, it had had an opportunity to choose a Senator, and it had failed to do so. Where do you find that in the Constitution? It may be true or it may be false that the framers of the Constitution never contemplated the failure of a legislature to choose a Senator to fill a vacancy; but they use in that respect elastic language, and the jurisdiction, so far as the governor was concerned, given by the Constitution, construed most strictly, depends on two facts—one, that a vacancy has happened, or occurred, or come to pass, or exists; the other, that it was in a recess of the legislature. These two jurisdictional facts existed, in my view, in the Corbett case.

I have often put the question: Suppose the legislature met and before they could elect a Senator was dispersed by an armed mob or driven away by some epidemic—cholera, yellow fever, or the like—would the governor have no power to make this temporary appointment if, when the Senate met, or if, when the vacancy occurred, there was a recess of the legislature? If not, why not? It would be no fault of the State. The people would have done all they could do; the legislature would have done all it could do; but if, prevented by overweening force, it had failed to choose a Senator, was it the purpose of the framers of the Constitution, having struggled so hard for a compromise which would leave the States equally represented here, that in a case such as that the governor should have no power even to make a temporary appointment?

Senators have answered me that in that case, possibly he might appoint, because the State would not be at fault; it would have tried to elect a Senator. My reply to that has been, and it is my reply to-day to it, Where do you find in the Constitution, the jurisdictional facts existing, the power to discipline and punish a State?

Mr. TURLEY. May I ask the Senator one question?

Mr. SPOONER. I hope the Senator will not. There are Senators who want to speak, and I have no right to yield.

Mr. TURLEY. Very well.

Mr. SPOONER. It may happen, as I suggested in the Corbett case, that a legislature is unable to elect and the reason for its failure is a creditable one. There may be differences of conviction in matters of great national policies, a contest between parties nearly equally divided, or a little band of men, honest men, of both political parties, may combine to defeat the election of a

Senator by bribery and fraud, thereby not only protecting the people of the State, but protecting the people of the United States and protecting the honor of the Senate. Is the State in such a case as that, the vacancy occurring during the recess of the legislature, to be deprived of representation?

I say again what I said before, that when you go beyond the spirit of this instrument in this respect and when you accord to a State or deny it equal representation in the Senate according to your judgment as to whether the State is or is not at fault, you tread upon dangerous ground. If there has been a case where a State was at fault and where a people could be said to be at fault, I think it was the State of New Hampshire, which year after year allowed its constitutional provision to remain, regulating the meetings of its legislature so that it could not elect seasonably in accordance with the act of Congress. That was a trouble which the people of that State could easily have remedied and which they did remedy after a while.

But meanwhile in the Bell case and in the Blair case Senators were admitted under appointment of the governor at the beginning of the term.

The whole point is this: It is only a temporary appointment; it only lasts until the next meeting of the legislature, which is commanded by the Constitution to then fill the vacancy; and I think when they inserted that provision in the Constitution they inserted it with a purpose to safeguard the interests and equality of the States here, and I am not prepared to believe that they expected it to be refined and whittled all to pieces until finally it was substantially eliminated from the Constitution.

Has the time come when Senators find authority to change the constitutional provision so as to make it read?—

> And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies, provided *the legislature shall have met and failed to elect.*

This proviso is not in the Constitution.

You add that proviso to that clause. Where do you find the authority to do it? Senators who criticise us for reading the word "happen" as "happen to exist" or "happen to be" as importing something into the Constitution which is not there, in order to disfranchise a State themselves add a proviso at the end of that clause, "if the legislature shall have met and failed to elect."

But, Mr. President, I must hasten. Great liberties have been taken with this clause of the Constitution. You ask the Senate to construe it literally. The Senate never has construed it literally. The Senate has sacrificed, and sacrifices now, the letter of this clause of the Constitution. Why? For the same purpose precisely which led the framers of that instrument to give the power of temporary appointment that the Senate may be full as nearly as possible and the States may be equal here. How? This says:

> The executive thereof may make temporary appointments *until the next meeting* of the legislature, which shall then fill such vacancies.

Mr. TILLMAN. Suppose the governor does not do it?

Mr. SPOONER. That is not the point. The governor may appoint "until the next meeting of the legislature, which shall then fill such vacancies." What does that word "meeting" mean? What does the word "until" mean? The word "meeting" is a plain word. It means to come together. It is defined by the Standard Dictionary "a coming together; an assembling." Webster defines it "a coming together; an assembly." It is not a word of technical signification.

The word "until" is familiar to every one who at all understands the language. It is simple and plain. The Standard Dictionary defines it, "to the time when; up to; till." Webster defines it, "to; till; as far as; to the point that; *especially, up to the time that.*" He says the word is rarely employed in modern usage, except as to time. No one can doubt that it is used in this clause of the Constitution solely with reference to time.

And what is the plain meaning, then, of the phrase "until the next meeting of the legislature?" It manifestly means that it limits the term of the appointee of the governor until the meeting (which probably includes organization) of the legislature. Of course, if literally construed, there would be a vacancy in the Senatorial office from the time the legislature meets until it chooses a Senator; and to guard against this, from an early day, in violation of the language, the Senate of the United States resorted to a fiction of law, and held that the meeting of the legislature was an entirety, lasting as it were but a day, and that the Senator was entitled to hold under the gubernatorial appointment until his successor was elected or the legislature adjourned without an election.

Is this obeying the letter of the Constitution? No. But it is yielding, Mr. President, to the spirit of the Constitution, and has been done in order to prevent by construction as far as possible a break in the representation of a State in this body.

One thing more, Mr. President, and I shall have finished. There is another clause in the Constitution almost identical with that under consideration. The third subdivision of section 2, Article II, of the Constitution provides that—

> The President shall have power to fill up all vacancies that may "*happen*" *during the recess of the Senate*, by granting commissions which shall expire at the end of their next session.

I never have known exactly what significance, if any, is to be attached to the word "up," used in this connection. If one fills a glass, I suppose he fills it up. If he fills it up, he does no more than fill it. If the Executive fills a vacancy, he fills it, and that is the end of it. The Senator from Kentucky [Mr. LINDSAY] seemed to put great emphasis upon the word "up." The meaning of the sentence would be precisely the same, I think, if the word were omitted.

Here in this clause of the Constitution we have the word "happen" again used in connection with a vacancy. It has never been construed to be limited at all to vacancies occasioned by casualty or anything in the nature of fortuitousness. It has from the beginning applied as much to vacancies caused by expiration of term as to vacancies caused by death, resignation, or otherwise, and of course no distinction could be made, because, however the vacancy is caused, it must, in the public interest, be filled.

The word "happen" is used also in connection with vacancy in subdivision 4 of section 2 of Article I of the Constitution, thus:

> When vacancies "happen" in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Placing the narrow construction upon the word "happen" which is contended for here, in connection with a vacancy in the representation in Congress, Mr. President, the governor would only have power to issue his writ for a special election, where by some fortuitous event the office of Representative became vacant, the term having once been filled. This would be nonsense. The clause applies as fully, and it has always been so held since the Constitution was adopted, to a vacancy caused by a failure of the people to elect, or by the death of a Representative elected but not sworn in, as to any other case.

But passing from the word "happen," I beg the attention of the Senate to the words "during a recess of the Senate." Note the similarity between the language employed in this clause and that employed in the clause under consideration here. The one clause says:

> And if vacancies *happen* by resignation, or otherwise, *during the recess of the legislature* of any State, the executive thereof may make temporary appointments, etc.

The other says:

> The President shall have power to fill up all vacancies that may *happen during the recess of the Senate.*

Will some Senator tell me upon what principle of constitutional construction these words, almost identical, used in each clause with relation to substantially the same subject, are to be given one construction where used in one clause and an entirely different construction where used in the other?

It became necessary early in the history of the Government to construe this language:

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate—

And it was found that if it were construed strictly, as Senators here desire it shall be construed, it would dismantle the ship; it would leave a vast number of administrative offices, which became vacant during a session of the Senate instead of during a recess of the Senate, unfilled, the laws to go unadministered, and so it was construed in a manner which would permit the spirit of the Constitution to control, and the purpose for which it was adopted to be subserved.

Attorney-General Wirt, discussing this clause (1 Opinions Attorneys-General, 631), says:

> The doubt arises from the circumstance of its having first occurred during the session of the Senate. But the expression used by the Constitution is "happen"—"all vacancies that may happen during the recess of the Senate." The most natural sense of this term is "to chance; to fall out; to take place by accident." But the expression seems not perfectly clear. It may mean "happen to take place"—that is, "to originate," under which sense the President would not have the power to fill the vacancy. It may mean also, without violence to the sense, "happen to exist," under which sense the President would have the right to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me the most accordant with the letter of the Constitution, the second the most accordant with its reason and spirit.
>
> This seems to me the only construction of the Constitution which is compatible with the spirit, reason, and purpose, while at the same time it offers no violence to its language. And these I think are the governing points to which all sound construction looks. The opposite construction is perhaps more strictly consonant with the mere letter, but it overlooks the spirit, reason, and purpose, and, like all constructions merely literal, its tendency is to defeat the substantial meaning of the instrument and to produce the most embarrassing inconveniences.

Further he says:

> In reason it seems to me perfectly immaterial when the vacancy first arose, for whether it arose during the session of the Senate or during their recess, it equally requires to be filled. The Constitution does not look to the

moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission.

Mr. Taney, Attorney-General under President Jackson, in an opinion dated July 19, 1832 (2 Opinions Attorneys-General, 525), concurring in the construction placed upon this clause by Mr. Wirt, says:

It was intended to provide for those vacancies which might arise from accident and the contingencies to which human affairs must always be liable. And if it falls out that from death, inadvertence, or mistake an office required by law to be filled is in recess found to be vacant, then a vacancy has happened during the recess, and the President may fill it. This appears to be the common sense and the natural import of the words used. They mean the same thing as if the Constitution had said, "if there happen to be any vacancies during the recess."

This view was concurred in by Mr. Legaré, October 22, 1841 (3 Opinions, 673); Mr. Mason, August 10, 1846 (4 Opinions, 523); Mr. Caleb Cushing, May 25, 1855 (7 Opinions, 186); Mr. Edward Bates, October 15, 1862 (10 Opinions, 356); Mr. James Speed, March 25, 1865 (11 Opinions, 179); Mr. Henry Stanbery, August 30, 1866 (12 Opinions, 32); Mr. William M. Evarts, August 17, 1868 (12 Opinions, 449); and Mr. Charles Devens (14 Opinions, 538).

I can not take the time to give the reasoning of these opinions. Of course it will be remembered that the appointment by the President consists of three steps. The nomination is one, the confirmation another, the commission is the third. Strictly, perhaps, the commission is only evidence of the nomination and confirmation. This construction is one of necessity. Otherwise if a vacancy came about during a session of the Senate and the President did not send in a nominee, or when the Senate had no time to confirm, or where an officer died in a distant land and notice of death did not seasonably arrive, and other cases, the President would have no power after adjournment of the Senate and during the remainder of the year to fill the office at all.

Mr. Justice Woods, of the Supreme Court of the United States, sitting at the circuit, approved this construction of the Constitution in the case of In re Farrow and Bigby (4 Woods Reports, page 491). After referring to the opinions of the distinguished jurists who had filled the office of Attorney-General, he says:

These opinions exhaust all that can be said on the subject. They were rendered upon the call of the executive department, and under the obligation of the oath of office, and are entitled to the highest consideration.

In his opinion Mr. Bates says that the power to fill vacancies which occur during the recess has been sanctioned, so far as he knows and believes, by the unbroken acquiescence of the Senate; it is true that individual members of the Senate have disputed the power, but not the Senate itself.

Congress has recognized the power by section 2 of the act of February 9, 1863 (Revised Statutes, section 1761), which declares, "No money shall be paid from the Treasury as salary to any person appointed during the recess of the Senate to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session, and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate."

The only authority relied on to support the other view is the case decided by the late Judge Cadwalader, the learned and able United States district judge for the eastern district of Pennsylvania.

It is no disparagement to Judge Cadwalader to say that his opinion, unsupported by any other, ought not to be held to outweigh the authority of the great names which are cited in support of the opposite view, and of the practice of the executive department for nearly sixty years, the acquiescence of the Senate therein, and the recognition of the power claimed by both Houses of Congress.

I therefore shall hold that the President had constitutional power to make the appointment of Bigby, notwithstanding the fact that the vacancy filled by his appointment first happened when the Senate was in session.

This is a list of distinguished lawyers, men acting under oath, Mr. President; men not sitting, as we are sitting, in a body *quasi* political; men in honor bound to advise the President as to his constitutional power. Without break from the days of Wirt down to to-day they have construed this same language as to the power to fill vacancies during a recess of the Senate and the word "happen" to mean "happen to be" or "happen to exist." It mattered not, according to their opinion, whether the vacancy occurred by expiration of a term of office or by some casualty or fortuitous event.

Mr. President, that, by early, long-continued, uniform practice of eighty years, is the settled construction of that language in the Constitution. The courts adhere to it upon that theory. The courts will continue to adhere to it upon that theory.

I believe, Mr. President, that the Presidents and their Attorneys-General have construed the language correctly. I believe the clause relative to the power of the governor to make temporary appointment of Senators, containing, as it does, substantially the same language, should receive the same construction. It is almost inconceivable that this language should mean one thing to the Presidents and their law officers and another thing in the Senate in its relation to the power of the governor to make temporary appointments of Senators. It was a necessary construction in the one case in order to prevent lapses in administration which would be intolerable to the people. It is quite as important in the other in order to secure the equality of the States intended by the Constitution, and to keep the body of lawmakers full, as nearly as practicable.

Mr. President, in my short and not very eventful life, in the practice of my profession I have had occasion many times to exercise in statutory and constitutional construction such ingenuity as I possess. Standing here in the Senate of the United States I can have no purpose except to carry out the object of the framers of the Constitution to keep the States—the greatest of all constituencies—equal in this body, as they were intended to be.

I would be ingenious if I could and it were necessary, in order to open the door, but not to shut and bar it to *temporary* appointments. If in the lapse of years, as sometimes seems, by the increase of partisanship in the States the spirit of patriotism has been somewhat impaired, if with the vast increase of wealth and "bossism" this power is abused by successful attempts upon the part of powerful and ambitious leaders to defeat elections by the people, that affords no reason why we should shave this constitutional provision into nothing, why we should take the narrowest conceivable view of it to exclude a State from equality here even though it be but temporary, while it may and it does afford good reason for changing the organic law or for enacting legislation which will tend to defeat such combinations in the States.

Mr. President, I have not been able myself to see that the provision of the constitution of Pennsylvania has bearing upon what we should do in the exercise of constitutional duty in this case.

I listened with great pleasure to the speech of my colleague upon this phase of the question yesterday. I have not had opportunity to read the speech. I am unable to agree with my colleague's view, but I can not withhold expression of my admiration for the ability, ingenuity, and eloquence with which he presented it, and I congratulate him and the great State which he so well represents here upon his auspicious entry into the debate of this forum. His speech was an honor to himself and to Wisconsin.

But, Mr. President, I do not perceive that the amendment to the constitution of Pennsylvania has in any wise, or could in any wise, deprive the governor of that State of the power of appointment, if without that provision he would possess the power, which I think he does. It is very true that by the Constitution of the United States the times, places, and manner of holding elections for Senators is primarily left to the States. They adopted various methods in various States. But Congress, in the exercise of the power to alter the regulations as to times and manner, passed the act of 1866.

Under that act, which I think is a full exercise of the reserve power—at any rate, as much as we have ever known, for it has never been admitted that Congress could fix the time when the legislature should meet—Congress has provided what legislature shall elect or choose a Senator. It is the legislature "chosen next preceding the expiration of the time for which any Senator was elected." Congress has provided at just what *time after the legislature meets* it shall proceed to choose a Senator; that covers the "time of holding election;" and Congress has prescribed the precise *manner* in which the election shall take place, first by separate votes in the two houses, afterwards by meeting in convention to verify, where the vote in each house has produced an election, or a vote in convention where the houses have not been able separately to elect. I think that covers the whole ground.

If the governor of Pennsylvania had, under the constitutional provision, called together the legislature, then, in their proceeding, they would have been bound as to the *time in the session* of electing a Senator and the *manner* of such election, by the provisions of the act of 1866; but I do not think it has been left to a State by any regulation of its own to deprive the governor of a power which he derives from the Constitution of the United States to make temporary appointment of a Senator.

Mr. President, I have not attempted to go through the precedents or to make any complete argument upon the subject. I have finished, and I regret very much that I have, by reason of interruptions, spoken longer than I intended. If I know myself there is no tie or influence which would lead me to vote to admit a man here whom I thought not entitled under the Constitution to come, nor is there any enmity, personal unpopularity, or popular prejudice which would induce me to vote to exclude a man from this Chamber who came here with credentials which I felt, under the Constitution of the United States, bound to accept. Pennsylvania, in my judgment, sends Mr. Quay here with such credentials, and I therefore shall cast my vote to admit him to a seat in the Senate.

Mr. STEWART. Mr. President, I would not occupy the time of the Senate for one moment in this case if the Corbett case had not been used as an argument in favor of excluding Mr. Quay from a seat in this body. I voted against seating Mr. Corbett upon an entirely different ground from any construction of this constitutional provision. If there had been no other reason but a construction of the Constitution, I should certainly have voted for Mr. Corbett. I may have been mistaken in the facts which influenced my vote; we frequently are; but we must vote conscientiously upon the facts that we possess and which we believe to be true.

I believed at the time, whether it was true or false, that Mr. Corbett, a very rich man, was in a conspiracy with the governor and others to prevent the organization of the legislature to secure the Senatorship for himself or his friends, and that the Senatorship was the prize which induced the defeat of that organization. I did not think that Mr. Corbett came with clean hands entitled to a seat under those circumstances.

I have no doubt whatever of the right and duty of the governor to appoint in a case like this. The question has always been very simple to me. I believe it was rightly construed for the first twenty-five years—yes, the first thirty years—till 1825. The phrase is:

And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Now, there are two very natural meanings to the word "happen." The first is to originate; to begin. That probably, if there were nothing else to govern it, would be the most plausible construction. It might be so construed in the general acceptation. But there is another way which comports with the object of it better. Undoubtedly the meaning that the framers of the Constitution had in mind is this: Happen to exist, or happen to be. That construction was given until 1825 without dissenting voice, and the same construction has been given from the foundation of the Government until now by the law officers of the Government, by all the Departments of the Government, to the same kind of language, which is as follows:

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

They said it would be an inconvenience if the Executive did not have the power to fill offices. It would be a great inconvenience, but nothing like so great as if the executive had not power to fill these places in the Senate, because the duties of those offices could generally be exercised by deputies, etc. There is hardly a case where there is no provision for some one else to discharge the duties. It is nothing like so urgent as in the case of Senators, because nobody can perform the duties. They can not be performed by a deputy.

All the law officers of the Government from its foundation down and every President have construed "happen" in that connection to mean "happen to be" or "happen to exist." There is no doubt concerning the language. Over a hundred years of constant construction of the word "happen," and for the first thirty or forty years it applied to Senators, it always seemed to me made the question very plain. I never had the slightest doubt that it was the duty of the governor to appoint in a case like this and that the Senate should receive the appointee. The object of the amendment at all providing for the filling of vacancies was to keep the Senate full. There can be no doubt of that. Why is it not just as important that it should be kept full when the vacancy happens before a recess? It exists during the vacation of the legislature, when it can not act. The same reason for representation exists in the one case as in the other. Why not give it the common-sense construction that it had at that time and which has been given to the same language in order to carry on the Government? Why give it a strained construction to deprive the State of its representation in the Senate? It ought not to be done, and I hope it will not be done in this case. It would be an exceedingly bad example.

Mr. TURNER. Mr. President, my convictions concerning the true interpretation of the Constitution will compel me, on the case made here, to vote against the seating of Mr. Quay. I do not rise for the purpose of making an argument to sustain the views which I hold. The case has already been argued so fully and with so much learning and ability on both sides that I could not hope to add anything of value to what has already been said, especially at this late hour and in the limited time permitted to me.

My purpose in taking the floor is simply to explain my vote in order that I may avoid possible misconstruction which might lead to undeserved criticism.

The impression prevails among the press and the public generally that this case is similar in every respect to the case of Mr. Corbett, decided by this body during the last Congress, and that all those Senators who then voted to seat Mr. Corbett must now, in order to be consistent, vote to seat Mr. Quay. This impression is a very erroneous one. The two cases are different in most essential particulars.

In the present case the legislature of Pennsylvania was in session balloting to elect a successor to Mr. Quay at the moment the vacancy occurred to fill which he holds the appointment of the governor, and it remained in session striving to elect a successor to him for several weeks thereafter.

In the Corbett case the legislature which ought to have elected a successor to Mr. Mitchell, the then sitting Senator for the State of Oregon, had never organized and did not, therefore, have an opportunity to ballot for Mr. Mitchell's successor. Moreover, if it had organized and balloted, its session would have expired by limitation, under the constitution of Oregon, before the expiration of Mr. Mitchell's term and therefore before the happening of the vacancy which Mr. Corbett was appointed to fill.

My view of the Constitution as applied to that case was that the governor was empowered to appoint to fill a vacancy happening from any cause—efflux of time or otherwise—during a recess of the legislature, and that he was still empowered to appoint where the vacancy happened from efflux of time, even where the legislature had balloted to fill the term, or might have so balloted if it had been organized, provided that the balloting or the opportunity to ballot was before the happening of the vacancy, and that the vacancy actually happened during a recess. Holding these views, I was compelled, of course, to vote in favor of seating Mr. Corbett. But I then held and expressed the other view—that vacancies happening while a legislature was in session, or happening before a legislative session and remaining unfilled until it met, could not be filled by the appointment of the governor. This view will compel me to vote against the seating of Mr. Quay.

I wish to read briefly from some remarks made by me on the Corbett case, for the purpose of indicating the position I then took concerning the constitutional power of the governors of the States in this class of cases. My remarks will be found on pages 2177 and 2178 of the CONGRESSIONAL RECORD for the Fifty-fifth Congress, volume 31, part 3:

Mr. President, it is undoubtedly true that the Federal Convention had in mind two methods of keeping the representation in the Senate filled, and that one of them may be properly termed primary and the other contingent. It expected that ordinarily legislatures would perform their constitutional duty and make elections at appropriate times, so that vacancies to occur at stated and known periods would be filled up in that manner.

This undoubtedly was the primary manner by which it was expected Senators would be accredited to this body. The contingent method was to be by appointment at the hands of the executives of the States, and was to be exercised by them only when the legislatures could not act and only until such times as the legislatures had had full opportunity to act. Nobody disputes this. But in one view of the question, I think, the effect to be attributed to this distinction is exaggerated and in the other I think it is lost sight of.

In my judgment, there is virtue in a middle course. Medio tutissimus ibis. When a vacancy happens under circumstances which bring it fairly within the language of the Constitution authorizing the governor to appoint, I would not defeat the exercise of that power on any strict construction of the Constitution. On the other hand, when it happens under circumstances not fairly within the language of the Constitution, I would not do violence to language in deference to some supposed overruling constitutional intent in order to effectuate that intent. It is not sufficient that a particular intent be found in a statute or constitution to justify a construction which will effectuate it. There must be apt words evidencing that intent upon which the construction can rest.

Now, it seems evident to my mind that those who claim to have discovered a purpose on the part of the Federal Convention to exclude the power of appointment from the executive in vacancies caused by the efflux of time must draw largely on inferences which, while they may find satisfactory countenance in the language of the Constitution construed in one sense, are yet opposed to the language of that instrument in another and almost equally permissible sense, and which are wholly opposed to the history of the convention in its dealings with the subject.

On the other hand, those who would throw the bars down entirely and say that vacancies existing at any time and under all circumstances may be filled by the executives of the States, and as often and as long as said vacancies happen to exist, not only have no warrant for such a position, except a supposed overruling intent, but their position is opposed to the express language of the Constitution and to a long line of precedents in this body which are absolutely unbroken and without contradiction.

I summed up my conclusions as follows:

First. They may appoint when a vacancy shall happen from any cause during a recess of the legislature.

Second. They may not appoint where the vacancy happens during a session of the legislature, or where, having happened before, it continues until after the legislature has adjourned.

Third. It follows as a corollary from the first proposition that the fact that a legislature makes an ineffectual effort to elect before the vacancy actually happens does not cut off the right of appointment by the executive.

Mr. President, I have not been shaken in these views by the debates to which I have listened in this case. I believed them to be sound when I uttered them, and I still believe them to be sound. And so believing, they will, of course, control my vote, although I might wish, on personal grounds, that it were possible to vote otherwise. But I do not conceive that personal considerations ought to have any weight, or that they do have any weight, with Senators in deciding grave constitutional questions of this character. Neither personal nor political considerations have any weight with me in this class of cases, and they never will have so long as I am honored with a seat in this Chamber.

Mr. DANIEL. Time presses, Mr. President, and I must be brief. I can not make a speech as I intended to do; I can only seek to impress a point upon the attention of the Senate. This is a judicial case and ought to be decided upon judicial principles. Upon my oath as a Senator of the United States, delivering true judgment according to my legal conviction, I do declare that I believe Matthew S. Quay is entitled to a seat in this body, and so believing, I shall so vote.

I have not time, Mr. President, to undertake any review of the authorities in this case. No review of them so far reflected in the Senate decisions would be satisfactory to analysis. In the space of one hundred and ten years in which questions like that before us have been debated its opinions have been as diversified, as

antagonistic, and as reversible as the opinions of some of our friends on the Porto Rican tariff.

I accept a point of view which was stated yesterday in a very able and interesting speech of the junior Senator from Wisconsin [Mr. QUARLES]. I have looked for his speech in the RECORD, that I might quote him accurately. Not finding it there, I must rely upon memory. In effect he said that each Senator should state the precise view upon which he bases his opinion. I base my opinion that Mr. Quay is entitled to a seat in this body upon the true intent and meaning of the Constitution as expressed in its language, accepting the meaning of that language as it has been construed in the Federal Government of the United States from the Administration of John Adams to this day.

The Senator from Wisconsin thinks that we ought to take this language all off by itself, hang it in the air, and construe it as if it stood alone. If it were so construed, the word "happen," which is elastic, flexible, and applicable in numerous ways, would not be contorted or twisted away from the fair and just significance which 12 Attorney-Generals of the United States have given it, if I gave the meaning to it which I do here.

But I shall not overlook, Mr. President, the wise injunction of John Marshall to those who would put a narrow, rigid construction upon the Constitution when he declared that they should not forget it was a Constitution they were construing. I would say to my learned friend, in reply to his very ingenious and able suggestions, that if we desire to do so, we can not forget that this is a Constitution we are construing, nor ought we to forget that all the Presidents of the United States, from John Adams to William McKinley, have construed these identical words which we are called upon to construe not in the narrow, technical, and alienated way that opposition Senators would suggest, but according to the fair and just meaning of the phraseology in its connection in the text of a living Constitution.

The question is, Mr. President, whether the word "happen" in the Constitution means "happen to begin" or "happen to be." The question is whether the moment of the happening of the vacancy was the predominant thing or the purview of the Constitution makers, or whether it was the vacancy so created that they had their eyes upon and which they desired to fill.

If we look at the debates in the Constitutional Convention we find it declared by one of the framers, Mr. Randolph, of Virginia, that the clause as to the temporary filling of vacancies by the governors of States was put in the Constitution to prevent "inconvenient chasms in the Senate." If there had been no declaration upon the subject it is the obvious and self-evident fact that such was the case, for no other purpose but to prevent inconvenient chasms in the Senate could have put it there.

The junior Senator from Wisconsin tells us that we ought not to construe the matter at all, it is so plain to mean what he thinks it means; and yet, Mr. President, when he delivered his eulogy upon our Constitution makers and their aptness in the use of language, he presently discerned that that plain meaning which he had put upon the terms of the Constitution produced a chasm in the Constitution—a casus omissus, as the lawyers term it—and that unless the governor can fill the vacancy after a legislature has failed to do so there is no power that could fill it.

And so to-day, Mr. President, when the Senator from North Dakota [Mr. MCCUMBER] came to construe this clause in the Constitution, he came to the conclusion that our Constitution makers were not as wise as the Senator from Wisconsin thought for, and that they had indeed left a cave in the Constitution with no power on earth extant and ready that can fill it.

Mr. President, the Constitution of the United States ought not to be construed by eyes astute to pull it to pieces. It was made for living beings in a world of work and trouble and care. The old common law told us, borrowing the doctrine from the civilians, that all written documents should be construed that their purpose might live and not perish.

And, sir, I am following the very fundamental spirit of the common law when I say that I shall construe the Constitution of the United States that the Government may live, that the State may live, that the Senate may live in perfect shape and not in mutilation.

Mr. President, if their construction of the word "vacancy" and of the word "happen" be true, the Congress of the United States is wrong in its daily legislation, and I beg to say to the honorable Senator from Maine [Mr. HALE], who is a member of the Committee on Appropriations, that he should look to the appropriation bill to apply the doctrines that he wants to apply to an election to the Senate.

Mr. President, here are the identical words, whose meaning we are invited to interpret, in the language as to Presidential appointments:

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate.

Now, apply the construction which these gentlemen invoke to that sentence, and where are we? The President could fill no vacancy beginning when the Senate was in recess, because "happen" means, as is contended, the moment the vacancy begins. He must enter into a scholastic discussion of the word "happen;" he must take his eyes entirely away from the yawning vacancy which the Constitution intended him to fill. The Presidents of the United States from John Adams down have looked at these words in the exactly opposite way. John Adams appointed Amos Binney naval agent in the city of Boston, although the vacancy did not begin in the recess of the Senate, but he thought it happened during the recess of the Senate, if it existed in the recess—for there it was for him to fill, and he filled it.

Mr. President, in the old days of the Democratic Presidents—Monroe, Jackson, Tyler, Polk, and Pierce—no question could have been made and no such "nice, sharp quillet of the law" could have destroyed the common sense of construction and put an impediment under the wheels of Government as is here suggested.

Attorney-General Wirt led off in an opinion to the contrary. He was a scholar. He wrestled with the giants of the bar. Before the Supreme Court he was a foeman worthy of any man's steel. He said that the word "happen" there meant "happen to exist." He did not put the word "exist" in the Constitution. He said the word "exist" was wrapped up in the meaning of the word "happen."

Mr. President, the idea of happening on the part of these narrow and rigid constructionists is that a happening must be of something that begins and ends instantaneously, like a pistol shot.

But, Mr. President, there are happenings which cover long periods of time. A storm happens; it may last a month. A calm at sea happens; it may last a year. A freeze happens, a rain happens, a famine happens, a plague happens, a drought happens—and the happening of them is of indefinite and may be of prolonged extension. So a vacancy happens. It is a condition that may be short or long. And must we be told that it can not be dealt with according to its nature? It was the condition—the condition of emptiness—that the Constitution looked at; and if we were to construe the Constitution of the United States in severe and critical fashion, we would break up all the great decisions of John Marshall and the Supreme Bench and recede in our great march of national progress and national development.

Some Senator has suggested that the vacancy which a governor can fill must not be one that happens by efflux of time. I have before me fourteen cases, of which I will hand a list to the Reporter—I have not now time to read them—in which this body has said that the vacancy that happens by efflux of time is a vacancy which a governor may fill as any other vacancy:

Walker, of Virginia, in 1790;
Cocke, of Tennessee, in 1797;
Tracy, of Connecticut, in 1801;
Hindman, of Maryland, in 1801;
Condit, of New Jersey, 1803;
Anderson, of Tennessee, in 1809;
Smith, of Maryland, in 1809;
Cutts, of New Hampshire, in 1813;
Williams, of Tennessee, in 1817;
Sevier, of Arkansas, in 1837;
Bell, of New Hampshire, in 1879;
Blair, of New Hampshire, in 1885;
Marston, of New Hampshire, in 1889; and
Pasco, of Florida, in 1893.

There is no point about this matter which has been so often decided as that point, and if the doctrine of stare decisis has anything in it, it ought to be left upon those fourteen cases, beginning in the early days of the Government, aye, with the first case, and coming down to a late period.

Much has been said about the case of Kensey Johns, referred to by the Senator from Kentucky [Mr. LINDSAY]. But the Senator from Kentucky forgot to tell the Senate, if he noted it, that the case before that of Kensey Johns was antagonistic to it, and so was the next case after it. There followed a series of cases overruling the case of Kensey Johns.

Gentlemen, in the fervor of debate, like my honorable friend from Michigan [Mr. BURROWS] was a week ago, may say that we are trying to overrule the precedents of a hundred years. The committee is a little more moderate. It gives us seventy-five years. If they will look at the case from Arkansas in 1837 they will have to move their time peg up twelve or thirteen more years, for Ambrose Sevier, of Arkansas, was seated in this body in 1837, after a legislative session had been held subsequent to the vacancy, and a good deal would have to be put into the Constitution to get him here unless its construction is that which I am now advocating.

Mr. President, I have before me the opinions of twelve Attorneys-General of the United States, in the Administrations of Monroe, Jackson, Tyler, Polk, Pierce, Lincoln, Johnson, Garfield, Arthur, and Harrison. Those lawyer Presidents and their advisers have construed that the word "happen" means just exactly what I think it means. Lincoln was noted for common sense. He thought that the vacancy was intended to be dealt with just as I

think it ought to be dealt with, and his Attorney-General, Edward Bates, so advised him, and Mr. Bates based his opinion in part, although it had many precedents, upon the continued acquiescence of the Senate.

Mr. President, a number of the other Attorneys-General have done likewise. I will hand this list of Attorneys-General to the Reporter, with the citation of the Reports of Opinions in which they may be found, that he may insert it in my remarks, for I have not time to read it.

Monroe, Attorney-General Wirt, October 22, 1823, volume 1, page 631, Opinions of the Attorneys-General.

Jackson, Attorney-General Taney, July 19, 1832, volume 2, page 525, Opinions of the Attorneys-General.

Tyler, Attorney-General Legaré, October 22, 1841, volume 3, page 673, Opinions of the Attorneys-General.

Polk, Attorney-General J. Y. Mason, August 13, 1846, volume 4, page 523, Opinions of the Attorneys-General.

Pierce, Attorney-General Caleb Cushing, May 25, 1855-57.

Lincoln, Supreme Court Judge Bates, October 15, 1862, volume 10, page 356.

Johnson, Attorney-General Speed, March 25, 1865, volume 11, page ——.

Johnson, Attorney-General Stanbery, August 30, 1866, volume 12, pages 323, 324.

Johnson, Attorney-General Evarts, August 17, 1868, volume 12, page 449.

Hayes, Attorney-General Devens, June 18, 1880, volume 16, page 523.

Arthur (not a lawyer), Attorney-General Brewster, February 21, 1883, volume 17, page 521.

Harrison, Attorney-General Miller, March 20, 1889, volume 19, page 263.

Now, Mr. President, this in conclusion: If it be true, as is suggested by the junior Senator from Wisconsin, that the vacancy must begin during a recess of the body which has the power primarily to act in order to make valid the appointment of the governor of a State here, then and in that event the vacancy must begin during the recess of the Senate to make valid a Presidential appointment, which is based upon exactly the same bottom.

Congress in 1863 passed a law, the Senate and House concurring with the Executive view of the meaning of these words, which, according to the opinion of Attorney-General Devens, shows the assent not only of the Senate but of the House of Representatives to the view that I am stating. Let me read it:

The act of February 9, 1863 (Rev. Stat., section 1763), is as follows:

"No money shall be paid from the Treasury as salary to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate."

As Attorney-General Devens says in Opinions, volume 16, page 523:

"This legislation, in assuming to act upon the salary of officers appointed during the recess of the Senate when the vacancies actually existed while the Senate was in session, must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution."

And in so construing those identical words in our Constitution as applied to the President, we can not get a new set of dictionaries, we can not invent a new language, we can not throw down the meaning which we attach to them and say that in election cases we hold differently.

Mr. President, there is the plain meaning of our mother English tongue. A vacancy happens to-day in the Senate of the United States. It happens like sickness happens, and is in itself a species of political sickness. During every moment of its existence it happens, like the session of the Senate happens, from the moment it begins to the moment that it ends. It happens like a battle happens, from the time the first gun is fired until the last gun is fired. The governor of the State of Pennsylvania has the only power on earth to-day extant that can fill it. He has filled it. In my humble judgment his appointee has as good and honest a title to fill a seat in this body as have any of our peers.

The PRESIDENT pro tempore. The hour of 4 o'clock has arrived. The motion before the Senate is that offered by the Senator from New Hampshire [Mr. CHANDLER] to strike out the word "not" from the pending resolution. The amendment will be stated.

The SECRETARY. It is proposed to strike out the word "not," in the first line of the resolution; so that the resolution if amended will read:

Resolved, That the Hon. Matthew S. Quay is entitled to take his seat in this body as a Senator from the State of Pennsylvania.

Mr. CHANDLER. I ask for the yeas and nays on the amendment.

The yeas and nays were ordered; and the Secretary proceeded to call the roll.

Mr. BURROWS (when his name was called). I have a general pair with the senior Senator from Louisiana [Mr. CAFFERY], but it is arranged that that pair shall be transferred to the Senator from Delaware [Mr. KENNEY], and I will vote. I vote "nay."

Mr. BUTLER (when his name was called). I am paired on this vote with the Senator from Indiana [Mr. FAIRBANKS]. I understand that the Senator from Illinois [Mr. CULLOM] is paired with the Senator from Florida [Mr. MALLORY]. If it be agreeable to the Senator from Illinois, I suggest that we transfer our pairs, so that we may both vote.

Mr. CULLOM. That is satisfactory to me.

Mr. BUTLER. Under that arrangement I am at liberty to vote, and I vote "nay."

Mr. CULBERSON (when Mr. CHILTON'S name was called). My colleague [Mr. CHILTON] is paired with the senior Senator from West Virginia [Mr. ELKINS]. If my colleague were present, he would vote "nay."

Mr. DEPEW (when his name was called). I am paired with the Senator from Ohio [Mr. HANNA].

Mr. ELKINS (when his name was called). I am paired on this question with the senior Senator from Texas [Mr. CHILTON]. If he were present, he would vote "nay;" and if I were at liberty to vote, I should vote "yea."

Mr. FOSTER (when his name was called). I am paired with the junior Senator from New Jersey [Mr. KEAN]. If he were present, he would vote "nay," and I should vote "yea."

Mr. KENNEY (when his name was called). On this question I am paired with the senior Senator from Louisiana [Mr. CAFFERY]. Were he present, I understand he would vote "nay." Were I at liberty to vote, I should vote "yea."

Mr. LODGE (when his name was called). On this question I am paired with the Senator from Nebraska [Mr. THURSTON]. If he were present, I should vote "yea," and he would vote "nay."

Mr. JONES of Arkansas (when Mr. MALLORY'S name was called). The Senator from Florida [Mr. MALLORY] is, as I unstand by arrangements made among Senators, paired with the Senator from Indiana [Mr. FAIRBANKS].

Mr. PETTUS (when his name was called). I have a general pair with the senior Senator from Massachusetts [Mr. HOAR]. If he were present, he would vote "yea," and I should vote "nay."

Mr. RAWLINS (when his name was called). I am paired on this question with the Senator from South Dakota [Mr. KYLE]. If he were present, I should vote "nay," and I understand that he would vote "yea."

The roll call was concluded.

Mr. HALE. Mr. President, I hope we may have complete order while the roll call is being recapitulated. Every Senator is interested in it.

The PRESIDENT pro tempore. Order is important, so that the roll may be corrected if anything is wrong about it.

Mr. HALE. Before the recapitulation of the vote is commenced, I announce the pair of the Senator from New Hampshire [Mr. GALLINGER] with the Senator from North Carolina [Mr. PRITCHARD]. The Senator from New Hampshire, if present, would vote "nay," and the Senator from North Carolina would vote "yea."

The Secretary recapitulated the vote; and the result was announced—yeas 32, nays 33; as follows:

YEAS—32.

Allison,	Deboe,	Mason,	Shoup,
Baker,	Foraker,	Morgan,	Spooner,
Carter,	Frye,	Nelson,	Stewart,
Chandler,	Gear,	Penrose,	Sullivan,
Clark, Wyo.	Hansbrough,	Perkins,	Taliaferro,
Cullom,	Jones, Nev.	Platt, N. Y.	Warren,
Daniel,	McComas,	Scott,	Wetmore,
Davis,	McLaurin,	Sewell,	Wolcott.

NAYS—33.

Allen,	Culberson,	McEnery,	Teller,
Bacon,	Hale,	McMillan,	Tillman,
Bard,	Harris,	Martin,	Turley,
Bate,	Hawley,	Money,	Turner,
Berry,	Heitfeld,	Platt, Conn.	Vest,
Burrows,	Jones, Ark.	Proctor,	Wellington.
Butler,	Lindsay,	Quarles,	
Clay,	McBride,	Ross,	
Cockrell,	McCumber,	Simon,	

NOT VOTING—22.

Aldrich,	Elkins,	Kean,	Pettus,
Beveridge,	Fairbanks,	Kenney,	Pritchard,
Caffery,	Foster,	Kyle,	Rawlins,
Chilton,	Gallinger,	Lodge,	Thurston.
Clark, Mont.	Hanna,	Mallory,	
Depew,	Hoar,	Pettigrew,	

So the amendment was rejected.

Mr. CHANDLER. I ask that the roll may be verified. It has not been verified, I think.

The PRESIDENT pro tempore. Does the Senator desire the roll to be reread?

Mr. CHANDLER. Yes, sir.

The Secretary again recapitulated the vote.

The PRESIDENT pro tempore. The nays have it, and the amendment is rejected. The question now before the Senate is on the adoption of the resolution reported by the Committee on Privileges and Elections.

Mr. HALE. Let us have the yeas and nays on the adoption of the resolution.

The yeas and nays were ordered; and the Secretary proceeded to call the roll.

Mr. CULBERSON (when Mr. CHILTON'S name was called). My colleague [Mr. CHILTON] is paired with the senior Senator from West Virginia [Mr. ELKINS]. If my colleague were present, he would vote "yea."

Mr. DEPEW (when his name was called). I am paired with the Senator from Ohio [Mr. HANNA]. If he were present, he would vote "yea" and I would vote "nay."

Mr. ELKINS (when his name was called). On this question I am paired with the senior Senator from Texas [Mr. CHILTON]; otherwise I should vote "nay."

Mr. FOSTER (when his name was called). I am paired with the junior Senator from New Jersey [Mr. KEAN].

Mr. HALE (when Mr. GALLINGER'S name was called). The Senator from New Hampshire [Mr. GALLINGER] is paired with the Senator from North Carolina [Mr. PRITCHARD]. The Senator from New Hampshire, if present, would vote "yea" and the Senator from North Carolina would vote "nay."

Mr. KENNEY (when his name was called). I am paired on this question with the senior Senator from Louisiana [Mr. CAFFERY]. Were he present and voting, he would vote "yea" and I should vote "nay."

Mr. LODGE (when his name was called). I am paired with the senior Senator from Nebraska [Mr. THURSTON]. If he were present, he would vote "yea," and I should vote "nay."

Mr. PETTUS (when his name was called). I am paired on this question with the senior Senator from Massachusetts [Mr. HOAR]. If he were present, I should vote "yea."

Mr. RAWLINS (when his name was called). I am paired with the Senator from South Dakota [Mr. KYLE]. If he were present, he would vote "nay" and I should vote "yea."

The roll call having been concluded, the result was announced—yeas 33, nays 32; as follows:

YEAS—33.

Allen,	Culberson,	McEnery,	Teller,
Bacon,	Hale,	McMillan,	Tillman,
Bard,	Harris,	Martin,	Turley,
Bate,	Hawley,	Money,	Turner,
Berry,	Heitfeld,	Platt, Conn.	Vest,
Burrows,	Jones, Ark.	Proctor,	Wellington.
Butler,	Lindsay,	Quarles,	
Clay,	McBride,	Ross,	
Cockrell,	McCumber,	Simon,	

NAYS—32.

Allison,	Deboe,	Mason,	Shoup,
Baker,	Foraker,	Morgan,	Spooner,
Carter,	Frye,	Nelson,	Stewart,
Chandler,	Gear,	Penrose,	Sullivan,
Clark, Wyo.	Hansbrough,	Perkins,	Taliaferro,
Cullom,	Jones, Nev.	Platt, N. Y.	Warren,
Daniel,	McComas,	Scott,	Wetmore,
Davis,	McLaurin,	Sewell,	Wolcott.

NOT VOTING—22.

Aldrich,	Elkins,	Kean,	Pettus,
Beveridge,	Fairbanks,	Kenney,	Pritchard,
Caffery,	Foster,	Kyle,	Rawlins,
Chilton,	Gallinger,	Lodge,	Thurston.
Clark, Mont.	Hanna,	Mallory,	
Depew,	Hoar,	Pettigrew,	

So the resolution was agreed to.

Mr. HALE and Mr. WOLCOTT addressed the Chair.

The PRESIDENT pro tempore. The Senator from Maine.

Mr. HALE. I move that the Senate do now adjourn.

Mr. CULLOM. I hope the Senator will not insist upon that motion. I should like to bring up the conference report on the Hawaiian bill.

Mr. CARTER. I hope the Senator will allow me to make a report.

Mr. WOLCOTT. Mr. President——

Mr. HALE. I think, Mr. President——

Mr. WOLCOTT. I renew the motion that the Senate do now adjourn.

Mr. HALE. I think the Senate had better adjourn; and I move that the Senate adjourn.

The PRESIDENT pro tempore. The question is on the motion that the Senate do now adjourn.

The motion was agreed to; and (at 4 o'clock and 22 minutes p. m.) the Senate adjourned until to-morrow, Wednesday, April 25, 1900, at 12 o'clock meridian.

HOUSE OF REPRESENTATIVES.

TUESDAY, *April 24, 1900.*

The House met at 12 o'clock m. Prayer by the Chaplain, Rev. HENRY N. COUDEN, D. D.

The Journal of yesterday's proceedings was read and approved.

ADMINISTRATION OF CIVIL AFFAIRS IN PORTO RICO.

Mr. COOPER of Wisconsin. Mr. Speaker, I ask unanimous consent for the immediate consideration of Senate joint resolution 116, reported by the Committee on Insular Affairs.

The SPEAKER. The gentleman from Wisconsin asks unanimous consent for the consideration of Senate joint resolution 116. Is there objection?

Mr. MCRAE. I ask that it be read, Mr. Speaker.

The SPEAKER. Let the resolution be reported.

The joint resolution was read, as follows:

Joint resolution to provide for the administration of civil affairs in Porto Rico pending the appointment and qualification of the civil officers provided for in the act approved April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes."

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until the officer to fill any office provided for by the act of April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," shall have been appointed and qualified, the officer or officers now performing the civil duties pertaining to such office may continue to perform the same under the authority of said act; and no officer of the Army shall lose his commission by reason thereof: *Provided*, That nothing herein contained shall be held to extend the time for the appointment and qualification of any such officers beyond the 1st day of August, 1900.

The following amendments, recommended by the Committee on Insular Affairs, were read:

Add at the end of line 13 of the printed joint resolution the following:

"SEC. 2. That all franchises, privileges, or concessions mentioned in section 32 of said act shall be approved by the President of the United States, and no such franchise, privilege, or concession shall be operative until it shall have been so approved."

Further amend by adding the following:

SEC. 3. That all charters granting any franchises, privileges, or concessions, mentioned in section 32 of said act, to private corporations shall provide that the same shall be subject to amendment, alteration, or repeal; shall forbid the issue of stock or bonds, except in exchange for actual cash or property at a fair valuation, equal in amount to the par value of the stock or bonds issued; shall forbid the declaring of stock or bond dividends, and, in the case of public-service corporations, shall provide for the effective regulation of the charges thereof, and for the purchase or taking by the public authorities of their property at a fair valuation. No corporation shall be authorized to conduct the business of buying and selling real estate, of issuing currrency, or of engaging in agriculture, or permitted to hold or own real estate, except such as may be reasonably necessary to enable it to carry out the purposes for which it was created. Banking corporations, however, may be authorized to loan funds upon real estate security, and to purchase real estate when necessary for the collection of loans, but they shall dispose of all real estate so obtained within five years after receiving the title. Corporations other than those organized in Porto Rico, and doing business therein, shall be bound by the provisions of this section so far as they are applicable.

Mr. MCRAE. I make no objection, Mr. Speaker.

The SPEAKER. Is there objection? [After a pause.] The Chair hears none. Is there any arrangement as to time?

Mr. COOPER of Wisconsin. I spoke to the gentleman from Virginia [Mr. JONES] last evening, and he said that an hour would be sufficient.

Mr. HILL. Mr. Speaker, I wish to reserve a point of order against the two amendments.

The SPEAKER. What was the statement of the gentleman from Wisconsin?

Mr. COOPER of Wisconsin. I spoke to the gentleman from Virginia last night, who is the leading member of the committee on the other side concerning the resolution, and he consented that one hour should be allowed.

The SPEAKER. Then it is understood that there is to be one hour's debate, thirty minutes to be controlled by the gentleman from Wisconsin and thirty minutes by the gentleman from Virginia [Mr. JONES]. Is there objection?

Mr. HILL. Mr. Speaker, it is understood that I reserved the point of order against the two amendments.

The SPEAKER. The gentleman's statement was heard. The Chair will state to the gentleman from Connecticut that unanimous consent has been given for the consideration of the bill.

Mr. HILL. That is all right. I want to reserve the point of order.

Mr. LOUD. Mr. Speaker, I trust the gentleman from Connecticut will present his point of order now. I yielded to the gentleman from Wisconsin with the understanding that not more than one hour should be taken up in the consideration of the resolution. If the gentleman is to press his point of order after the hour is taken up, I can not yield.

Mr. HILL. Well, Mr. Speaker, I make the point of order now. I make the point of order, in the first place, that the amendments are not germane to the resolution; in the second place, that the joint resolution can not be so amended; in the third place, that if so amended it must be considered in Committee of the Whole, and in the fourth place, that the joint resolution is temporary in its character and that the amendments are permanent.

The SPEAKER. Does the gentleman from Wisconsin [Mr. COOPER] desire to be heard on the point of order?

Mr. COOPER of Wisconsin. I do not think this exact question has ever been before the House. I can not find any precedents precisely covering the case. However, in view of the character of the proposed legislation on which the point of order is raised, I do not think it would be well to have it pressed, for more reasons than one.

Mr. JAMES R. WILLIAMS. Mr. Speaker, I should like to be heard on the point of order. This new resolution, which, as I understand, has already passed the Senate, proposes to amend the